TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 231.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, APPELLANT,

vs.

FREDERICK ZIMMERMAN, AS ADMINISTRATOR OF L. ZIMMERMAN, DECEASED.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED FEBRUARY 16, 1907.

(20,574.)

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1 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 7719.

FREDERICK ZIMMERMAN, as Administrator of the Estate of L. Zimmerman, Deceased, Complainant,

vs.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, Defendant.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Frederick Zimmerman, as Administrator of the estate of L. Zimmerman, deceased: Greeting:

You are hereby cited and admonished to be and appear at the United States Supreme Court, to be holden in the City of Washington, District of Columbia, on the 16th day of February next, pursuant to an order allowing an appeal entered in the Clerk's office of the Circuit Court of the United States, for the District of Kansas, First Division, in that certain action numbered 7719, in which the Kansas City Northwestern Railroad Company is appellant and you are *appellee*, to show cause, if any there be, why the decree rendered against the said appellant, as in said order allowing the appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witnesseth, the Honorable John C. Pollock, Judge of the Circuit Court of the United States, in and for the District of Kansas,
2 this 17th day of January, A. D. 1907.

JOHN C. POLLOCK,
Circuit Judge.

Service of the within citation, and the receipt of a copy thereof admitted, this 21 day of January, 1907.

ATWOOD & HOOPER,
Solicitors for Fredrick Zimmerman, Administrator.

3 & 4 [Endorsed:] No. 7719. Frederick Zimmerman, Adm'r, &c., *v.* The Kansas City North Western R. R. Co. Citation. Filed Jan'y 17, 1907. Geo. F. Sharitt, Clerk.

5 STATE OF KANSAS, *Leavenworth County, ss:*

In the District Court in and for said County.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Plaintiff,

vs.

KANSAS CITY NORTHWESTERN RAILROAD COMPANY and THE CITY OF LEAVENWORTH, Defendants.

Petition.

The above named plaintiff complains of the above named defendants and for cause of action against them and each of them alleges: that he is the duly appointed, acting and qualified Administrator of the estate of Leonard Zimmerman, deceased, and that the Kansas City, Northwestern Railroad Company is a railroad corporation duly organized and existing under and by virtue of the laws of the State of Kansas, and owns a railroad, engines, cars, etc., and is operating the same into and through the county and city of Leavenworth and through other counties and Cities in said state; that the said city of Leavenworth is a municipal corporation and City of the first class, under the laws of said State, and has been such during all the times herein mentioned.

Plaintiff further avers that on the 8th day of October, 1872, the Kansas City, Wyandotte & Northwestern Railway Company, a corporation, was duly organized and chartered for the purpose of constructing and maintaining a railroad and telegraph lines in connection therewith and the business of said railway company was to be transacted in the counties in the state of Kansas through which said railroad and telegraph lines passed; and that on the 27th day of September, 1886, the Leavenworth & Olathe Railroad Company, a

6 corporation, was duly organized and chartered for the purpose of constructing and maintaining and operating a standard and broad gauge railroad extending and intended to be run through and from the city of Leavenworth, in the county of Leavenworth, Kansas, then southwesterly through the counties of Leavenworth, Wyandotte and Johnson to the city of Olathe in the last named county.

Plaintiff further avers that after the organization and chartering of the aforesaid companies, they proceeded to condemn, lay out a right of way, and build a railroad through and into the city and County of Leavenworth; that before the completion thereof and to-wit, on the 29th day of March, 1887, the said Kansas City, Wyandotte & Northwestern Railway Company and the Leavenworth & Olathe Railroad Company consolidated under the laws of the State of Kansas, as The Kansas City, Wyandotte & Northwestern Railroad Company, and in the articles of consolidation, the Kansas City, Wyandotte & Northwestern Railroad Company in writing accepted all the rights and privileges, and assumed all the obligations and liabilities of every nature and kind of the aforesaid companies, the Kansas

City, Wyandotte & Northwestern Railway Company and the Leavenworth & Olathe Railroad Company; that thereafter said Kansas City, Wyandotte & Northwestern Railroad Company took charge of all the property of the aforesaid two companies, accepted all the rights, franchises and privileges and assumed all the obligations and liabilities of the aforesaid two companies, and proceeded to complete, construct and build said railroad.

Plaintiff further avers that said Leonard Zimmerman in his life time was the owner of fractional lot seven (7) in block seven (7) and lots six (6) and seven (7) in block eight (8) all in Fackler's Addition to the City of Leavenworth, Leavenworth county, Kansas; that Second street was a duly laid out and established graded street in the city of Leavenworth, running North and South, and running between blocks seven (7) and eight (8) block seven (7) lying on the East side of said Second street, and block eight (8) on the West side of said Second street, that said Zimmerman's property, to-wit, lot seven (7) faces Second street on the East and that said lot six (6) and fractional lot seven (7) face said Second street on the wast.

Plaintiff further avers that said Kansas City, Wyandotte & Northwestern Railroad Company, after acquiring the rights as aforesaid, proceeded to finish, construct, and build its road in a north-easterly direction through the city of Leavenworth until it came to a
7 point on the south line of fractional lot seven (7) of said L. Zimmerman's property and then without any right or authority, and without condemning the same, appropriated a part and portion of said fractonal lot seven (7) and constructed its railroad in the same direction across and over that part or portion of said Second street immediately in front of said L. Zimmerman's property mentioned aforesaid; graded, raised and made a high embankment of a permanent nature and placed rails thereon the whole width of said street and thereby changed and raised the established grade of said Second Street to a great height*h* immediately in front of the above described property, and seriously and permanently impaired the egress and ingress to and from said property, and thereby damaging him in a great sum of money; as will more fully appear hereinafter.

Plaintiff further avers that on the 2nd day of February, 1889 said L. Zimmerman, deceased, began his action against said Kansas City, Wyandotte and Northwestern Railroad Company, in the district court of Leavenworth county, Kansas, to recover damages for the aforesaid wrongs and that on the 15th day of May, 1897, he duly recovered in the above entitled court and cause judgment against the defendant, said Kansas City Wyandotte & Northwestern Railroad Company for the sum of Three thousand dollars, ($3,000.00) which judgment is unappealed from, unreversed, and now of full force and effect; all of which will more fully appear from a true copy of said judgment, hereto attached, made part hereof and marked "Exhibit A."

Plaintiff further avers that afterwards and on the 7th day of May, 1898, said judgment was duly revived in the name of Frederick

Zimmerman, Administrator of the estate of Leonard Zimmerman, deceased; all of which will more fully appear from a true copy of the judgment order of revivor hereto attached, made a part hereof and marked "Exhibit B."

Plaintiff further avers that during this time and about January 2, 1888, the said Kansas City, Wyandotte & Northwestern Railroad Company mortgaged its said road, franchise and equipments to the Farmers Loan and Trust Company of New York, and that on or about March 21, 1890 the said Trust Company began its action in the Circuit Court of the United States for the District of Kansas,

8 to foreclose its said mortgage, and that on or about the 18th day of June, 1891, a decree was entered against said Kansas City, Wyandotte & Northwestern Railroad Company foreclosing said mortgage and ordering said property to be sold unless within some short time thereafter, in said decree mentioned, said railroad company or some person or persons for them, should pay the amount of said mortgage indebtedness, with the expense and costs thereof, and that on or about the — day of —— 189– said railroad company and all its equipments, appurtenances, etc., were ordered to be sold and were on or about the — day of —— 189– duly sold to the defendant, the Kansas City, Northwestern Railroad Company, and that said defendant became the successor in interest to all the rights, franchises and privileges of said Kansas City, Wyandotte & Northwestern Railroad Company, and as part of the consideration assumed and was subject to all the liabilities of the Leavenworth & Olathe Railroad Company and the Kansas City, Wyandotte & Northwestern Railway Company *and the Kansas City, Wyandotte & Northwestern Railroad Company,* under and by virtue of said decree and purchase.

Plaintiff further avers that on the 17th day of November, 1886 the aforesaid Leavenworth & Olathe Railroad Company procured the Mayor and Counsel of the City of Leavenworth, Kansas, to pass an ordinance granting to said railroad company certain right of way privileges in the city of Leavenworth, and that in said ordinance said Leavenworth & Olathe Railroad Company was granted the right to cross Second street at some point south of the north line of Maple street; also over the South levee Front street, and the South Esplanade from the South line of Fackler's Addition to the North line of Spruce, etc. and that as a condition for the grant and privilege mentioned in said ordinance, it was provided that in all such cases "where the grade of any street or public ground is changed by said company or its successors it shall protect the City from cost and damage at the suits of the property owners;" all of which will more fully appear by a true copy of said ordinance, hereto attached and made part hereof and marked "Exhibit C."

Plaintiff further avers that on or about the 19th day of

9 January, 1887 said Leavenworth & Olathe Railroad Company accepted the terms and agreed to the conditions provided and mentioned in said ordinance; and that in and by the articles of consolidation mentioned aforesaid, the Kansas City, Wyandotte & North-

western Railroad Company, assumed, accepted and agreed to all the terms, obligations and conditions of said ordinance and that under and by virtue of the decree of foreclosure and the purchase aforesaid and of accepting and operating said railroad under and by virtue of the ordinances of said city and its agreement to save the City of Leavenworth harmless from all damages sustained by property owners by reason of the construction of the railroad aforesaid, said defendant, the Kansas City, Northwestern Railroad Company has become liable to said plaintiff for the amount of said judgment with interest and costs.

Plaintiff further avers that long before the above judgment was obtained all the property of the Kansas City, Wyandotte & Northwestern Railroad Company was under and by virtue of said decree sold to said defendant herein, the Kansas City, Northwestern Railroad Company, and that under and by virtue of said decree and the ordinances of said city, said defendant Kansas City, Northwestern Railroad Company assumed and agreed to pay off any and all obligations of the Kansas City, Wyandotte & Northwestern Railroad Company and that under and by virtue thereof the Kansas City, Wyandotte & Northwestern Railroad Company has turned over to said defendant railroad company all of its property rights and franchises and has no property of any kind or description subject to execution and has refused to pay any part or portion of said judgment and that the same cannot be made on execution or by any means or process against the Kansas City, Wyandotte & Northwestern Railroad Company and that said Kansas City, Wyandotte & Northwestern Railroad Company and defendant Kansas City, Northwestern Railroad Company neglect and refuse to pay the aforesaid judgment or any part thereof although often thereunto requested.

Plaintiff further avers that said defendant, the City of Leavenworth is permitting, aiding and assisting the Kansas City Northwestern Railroad Company, its co-defendant herein, in the operation and maintainance of said railroad within said city in violation of the plaintiff's rights and in violation of said ordinance and of the ordinances of said city and that it is permitting and aiding and assisting its co-defendant herein to run across said Second street and to maintain its embankments and tracks above the established grade of said Second street to the heighth of two or three feet or more; all in violation of the aforesaid ordinance and the ordinances of said city, well knowing that the said defendant company or any person or persons for them neglect and refuse to pay the aforesaid mentioned judgment or any part thereof or to duly compensate the property owners for damages they may have sustained by reason of the construction of said railroad and which said railroad companies its successors and assigns have agreed to pay when they accepted the privileges and benefits of said ordinance.

Wherefore plaintiff prays and demands judgment against the defendants the Kansas City, Northwestern Railroad Company and the City of Leavenworth for the sum of $3,000.00 with interest at the rate of six per cent. per annum from the 15th day of May, 1897 until paid and for costs of suit.

Plaintiff further prays that said defendant the Kansas City, Northwestern Railroad Company be permanently enjoined and restrained from operating its said railroad over that part or portion of defendant's land appropriated as aforesaid and from operating and maintaining said embankment across said Second street in front of plaintiff's property until it pays or some person or persons for them the aforesaid mentioned judgment and compensate said plaintiff for the damages and property taken by the aforesaid mentioned railroads and for all such other and further relief in the premises as plaintiff may be entitled to.

JNO. H. ATWOOD &
W. W. HOOPER,
Attorneys for Plaintiff.

11 "EXHIBIT A."

Ordinance No. 1296.

An Ordinance Granting Certain Rights of Way and Privileges to the Leavenworth and Olathe Railroad Company.

Be it ordained by the Mayor and Councilmen of the City of Leavenworth, Kansas:—

SECTION 1. That the right to construct and operate a single line of railway track be and is hereby granted to the Leavenworth & Olathe Railroad Company for a period of 20 years from and after the passage of this ordinance; over and upon the following streets and public grounds of the city of Leavenworth, to-wit: Across Limit street on the Southern bound-ry of the city; also across Second street at some point south of the north line of Maple street; also over the south levee, front street, and South Esplanade, from the south line of Fackler's addition to the north line of Pine street; also across Spruce and Olive streets, east of Main street and also across all other public grounds east of Main street, from the north line of Olive street, northward to a point north of Choctaw street, to connect with the tracks of the Leavenworth Depot and Railroad Company.

SECTION 2. That the grant herein made is upon the following conditions: The right is reserved and given to the Mayor and council of this city to allow other railroad companies to use the right of way of the Leavenworth and Olathe Railroad Company from said Limit street to said point of connection with the track of said Leavenworth Depot & Railroad company and any track laid on said right of way, such company or companies to pay the Leavenworth & Olathe Railroad Company a proportionate amount of the costs of the construction and maintainance of the same, and of the cost of such right of way. All differences between said companies as to the amount to be paid, and the manner of use to be determined by representatives one to be selected by each company and in case such two representatives cannot agree thereon, or said Leavenworth & Olathe Railroad company neglects to name its representative, then the mayor and

council of this city shall designate another arbitrator who shall act with the others in determining the points of difference. Said
12 Leavenworth & Olathe Railroad Company in crossing said streets shall so grade the approach on each side of its track as to permit easy and safe crossing of the same and when practicable, shall pass under the grade of the street and shall bridge such cut for the passage of pedestrians and vehicles on the street. In all such cases where the grade of any street or public ground is changed by said company, it shall protect the city from cost and damage at the suits of property owners. All questions as to the manner of construction of said railroad over the right of way herein granted and concerning the protection of the streets and public grounds, and the safety and convenience of the passage of people and vehicles over the same shall be determined by the engineer of said company and the city engineer and the differences between them shall be determined by the mayor and council of this city. Unless said company shall construct and operate its track over the right of way herein granted within one year from the passage of this ordinance all rights under this ordinance shall be forfeited without further action on the part of the city.

Provided that if said company shall be delayed in the construction of its said road in the city of Leavenworth by an injunction or other litigation, the time that said company shall be so delayed shall not be computed as a part of the year within which it is required to construct and operate over the right of way herein granted, but said company shall have within which to construct its said track, one year exclusive of the time it may be so delayed by injunction or other litigation. Said company shall by writing accept the terms and conditions of this ordinance within twenty days from the passage thereof.

SECTION 3. That this ordinance shall take effect and be in force from and after its approval and publication.

Approved November 17th, A. D. 1886.

S. F. NEELY, *Mayor.*

Attest:

WM. SHEPHERD, *City Clerk.*

Passed November 17th, A. D. 1886.
Published November 18th, A. D. 1886.

13 "EXHIBIT A."

UNITED STATES OF AMERICA:

Be it remembered, that at the April Term, A. D. 1897, of the District Court of the First Judicial District of the State of Kansas, sitting within and for the county of Leavenworth, in said State, begun and held in the City of Leavenworth, commencing on Monday the 19th day of April, A. D. 1897, Present the honorable Louis A. Myers, Judge, J. H. Rothenberger Sheriff, of Leavenworth county, Kansas and James Gray, Clerk: the following proceedings were had to-wit:—

SATURDAY, *May 15th, A. D.* 1897.

Court met pursuant to adjournment.
Present as before.

No. 10568.

LEONARD ZIMMERMAN, Plaintiff,
against
THE KANSAS CITY, WYANDOTTE AND N. W. RAILROAD COMPANY, Defendant.

Now on this 15th day of May, A. D. 1897, and during the regular April Term of the District Court of Leavenworth County, Kansas, came on for hearing the defendant's motion for a new trial in the above entitled action; the plaintiff being present by his attorneys Baker Hook & Atwood and the defendant by its attorneys W. P. Waggener and C. F. W. Dassler and the matters and things having been submitted to the court and after arguments of counsel the said motion for a new trial is overruled, defendant excepting, and thereupon it is ordered adjudged and decreed that the said plaintiff do have and recover judgment of and from said defendant, for the sum of Three Thousand ($3000.00) dollars and for $—— costs of suit and that execution issue therefor.

On application of the defendant the time within which to make and serve a case-made for the Supreme court is hereby extended ninety (90) days from this date and the plaintiff is allowed 20 days thereafter in which to suggest amendments and the same to be settled on five days notice by either party.

14 "EXHIBIT B."

UNITED STATES OF AMERICA:

Be it remembered, that at the April Term, A. D. 1898, of the District Court of the First Judicial District of the State of Kansas, sitting within and for the county of Leavenworth, in said State begun and held in the City of Leavenworth, commencing on Monday the 18th day of April, A. D. 1898, Present the honorable Louis A. Myers, Judge, Peter Everhardy, Sheriff of Leavenworth county, Kansas and James Gray, Clerk; the following proceedings were had to-wit:—

SATURDAY, *May 7th, A. D.* 1898.

Court met pursuant to adjournment.
Present as before.

No. 10568.

L. ZIMMERMAN, Plaintiff,
against
THE KANSAS CITY, WYANDOTTE AND NORTHWESTERN RAILROAD COMPANY, Defendant.

And now on this 7th day of May, A. D. 1898, comes Fred Zimmerman, Administrator of the estate of L. Zimmerman deceased, by Baker Hook & Atwood, his attorneys and thereupon came on for hearing the motion of the said administrator heretofore filed herein to revive in the name of Fred Zimmerman as administrator of the estate of L. Zimmerman, deceased, this action and the judgment heretofore rendered in this action, on May 15th, 1897, in favor of the plaintiff, L. Zimmerman and against the defendant The Kansas City Wyandotte and N. W. R. R. Co.; and it appearing to the court that the defendant herein has been duly and legally served with a notice of said motion and that they failed to appear either in person or by an attorney or to show any cause why said motion should not be sustained.

It is therefore now by the court considered ordered and adjudged that Fred Zimmerman as Administrator of the estate of L. Zimmerman deceased be and he is hereby substituted as plaintiff herein with all the rights of the said plaintiff and that this action and the orders and judgment rendered herein stand revived and hereafter proceed in the name of the said Fred Zimmerman as Administrator of the estate of L. Zimmerman deceased and that he as such administrator have and recover of and from said defendant herein the sum of $3000.00 with interest thereon at the rate of 6% per annum from the 15th day of May, 1897, until paid and also the costs in this suit and that execution issue therefor.

STATE OF KANSAS, *Leavenworth County, ss:*

I, James Gray, Clerk of the District Court of the First Judicial District of the State of Kansas, sitting within and for the county aforesaid, do hereby certify the above and foregoing to be —— true full and complete copy of the journal entry of the order of court reviving this action and judgment in name of Fred Zimmerman as administrator of the estate of L. Zimmerman, in the therein entitled cause, as the same remains of record in my office.

Witness my hand and the seal of said court affixed at my office in the City of Leavenworth, this the 24th day of May, A. D. 1899.

JAMES GRAY, *Clerk*,
By J. H. KIRMEYER,
Deputy Clerk.

16 *Præcipe for Summons.*

THE STATE OF KANSAS, *Leavenworth County, ss:*

In the District Court of the First Judicial District of the State of Kansas, Sitting in the County of Leavenworth, in Said State.

No. —.

FREDERICK ZIMMERMAN, as Administrator, &c., Plaintiff,
versus
KANSAS CITY NORTHWESTERN RAILROAD CO. ET AL., Defendants.

The Clerk of the above named court will please issue a summons to the defendant Kansas City Northwestern R. R. Co. and the City of Leavenworth in the above entitled cause, directed to the Sheriff of Leavenworth county, Kansas, to serve, returnable within 10 days from this date. Suit brought for recovery of money. Amount claimed $3000.00 with interest at 6% from May 15th, 1897 until paid and costs of suit.

Dated the 31st day of May A. D. 189–.

JOHN H. ATWOOD AND
W. W. HOOPER,
Attorneys for Plaintiff.

Endorsed: No. — Præcipe for Summons. District Court, Leavenworth County, Kansas. Frederick Zimmerman as administrator &c. *vs.* Kansas City Northwestern R. R. Co. *et al.* Filed May 21, 1899 James Gray, Clerk John H. Atwood and W. W. Hooper, Plaintiff's Attorney-.

17 UNITED STATES OF AMERICA.

STATE OF KANSAS,
First Judicial District, Leavenworth County, ss:

The State of Kansas to the Sheriff of Leavenworth County in said State, Greeting:

You are hereby commanded to notify Kansas City Northwestern Railroad Company and the City of Leavenworth that they have been sued by Frederick Zimmerman administrator of the estate of L. Zimmerman deceased, in the District court sitting in and for said county of Leavenworth, and that unless they answer by the 30th day of June A. D. 1899 the petition of the said Frederick Zimmerman administrator of the estate of L. Zimmerman, deceased against them, filed in the Clerk's office of said court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this Summons, on the 10th day of June 1899.

Witness my hand and the seal of said court, affixed at my office, in the City of Leavenworth, this the 31st day of May, 1899.

[SEAL.] JAMES GRAY, *Clerk.*

Suit brought for the recovery of money. Amount claimed $3,000.00 with interest thereon from May 15th, 1897 at the rate of 6 per cent. per annum until paid and for costs of suit &c. "See Petition" Jno. H. Atwood & W. W. Hooper, attorneys for plaintiff.

Endorsed: Received May 31st A. D. 1899 at 4:15 o'clock P. M. Summons. Page 64 No. 13947 Docket 23 District Court, Leavenworth county, Kansas. Frederick Zimmerman administrator &c. *vs.* Kansas City Northwestern Railroad Company *et al.* Issued May 31st, 1899 Returnable June 10th, 1899 Answer due June 30th, 1899 Jno. H. Atwood & W. W. Hooper, Plaintiff's attorneys.

I received this Summons on the 31st day of May A. D. 1899 at 4.15 o'clock P. M. of that day, and I served the same Summons in my county of Leavenworth, Kansas, on the within named defendant Kansas City Northwestern Railroad Company a corporation by delivering a true and certified copy thereof with all the endorsements thereon to E. W. Waynant personally on the 5th day of June A. D. 1899 he the said E. W. Waynant then and there being the general agent and freight agent of said defendant and there being no person residing in said county of Leavenworth, Kansas designated by said defendant Kansas City Northwestern Railroad Company a corporation on whom all process and notices issued by any court of record or Justice of the Peace of said county may be served and on the same day I serve- the other within named defendant The City of Leavenworth by delivering a true and certified copy thereof with all of the endorsements thereon to S. F. Neely personally he the said S. F. Neely then and there being Mayor and chief officer of the within named defendant The City of Leavenworth.

18

Dated this 7th day of June A. D. 1899.

PETER EVERHARDY,
Sheriff of Leavenworth County, Kas.,
By THOS. J. BROWN,
Deputy Sheriff.

Fees.

Service (2 persons)	$.75
Copy (2)	.50
Non est (—)	—
Mileage (— miles)	—
Total	$1.25

Filed this 7 day of June A. D. 1899.

JAMES GRAY, *Clerk.*

19 In the District Court of Leavenworth County, Kansas.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Plaintiff,

vs.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY and THE CITY OF LEAVENWORTH, Defendants.

Demurrer.

Now comes said defendant, The Kansas City Northwestern Railroad Company, and demurs to the petition of the plaintiff filed herein for the reason;

1. Because the court has no jurisdiction of the subject matter of said action, and no authority of law to hear, try or determine the issues therein.

2. Because the petition of the plaintiff herein does not state facts sufficient to constitute a cause of action in favor of said plaintiff and against this defendant.

WAGGENER, HORTON & ORR,
Attorneys for Defendant The Kansas City Northwestern Railroad Co.

Endorsed: 13947 Fred'k Zimmerman adm'r. Plaintiff *vs.* The Kansas City Northwestern Rld. Co. Defendant. Demurrer. Filed June 28, 1899 James Gray, Clerk J. H. Kirmeyer Deputy Waggener, Horton & Orr Atty's for K. C. N. W. Rld. Co.

20 In the District Court of Leavenworth County, Kansas.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Plaintiff,

vs.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY and THE CITY OF LEAVENWORTH, Defendants.

Petition for Removal.

To the Honorable The District Court of Leavenworth County, Kansas:

Your petitioner, The Kansas City Northwestern Railroad Company, respectfully shows to this honorable court, that the matter and amount in dispute in the above entitled cause, exceeds exclusive of interest and costs, the sum of $2,000.

Your petitioner further shows, that it appears from the plaintiffs petition filed herein, that on January 2nd, 1888, The Kansas City, Wyandotte & Northwestern Railroad Company, mortgaged its road, franchises and equipment to The Farmer's Loan & Trust Company, of New York, and that on or about the 21st day of March, 1890, the said The Farmers Loan & Trust Company of New York,

began its action in the Circuit Court of the United States, for the District of Kansas, to foreclose said mortgage, and that on or about the 18th day of June 1891, a decree was duly entered against the said, The Kansas City, Wyandotte & Northwestern Railroad Company, foreclosing said mortgage, and ordering said property to be sold; and that thereafter the said property of said, The Kansas City, Wyandotte & Northwestern Railroad Company was duly sold, and the sale was thereafter duly confirmed; and that the said, The Kansas City Northwestern Railroad Company, the defendant herein, became the successor in interest to all the rights, franchises and privileges of said, The Kansas City, Wyandotte & Northwestern Railroad Company, and as a part of the consideration assumed and was subject to all the liabilities of the Leavenworth & Olathe Railroad Company, and The Kansas City, Wyandotte & Northwestern Railroad Company, and The Kansas City, Wyandotte and Northwestern Railroad Company, under and by virtue of said decree and purchase; and the said plaintiff bases his cause of action upon said decree of the Circuit Court of the United States, for the District of Kansas, and upon the constitution and laws of the United States, and that to determine said above cause involves the construction of said decree, and of the Constitution and of the laws of the United States; and that said above entitled cause is one growing out of said decree and of the sale of the property of the said, Kansas City, Wyandotte & Northwestern Railroad Company to this defendant, which said decree was entered in said cause pending between said, The Farmers Loan & Trust Company of New York, and The Kansas City, Wyandotte & Northwestern Railroad Company, in the Circuit Court of the United States for the District of Kansas, and involves the construction of said decree and the constitution and laws of the United States.

And your petitioner further shows, that the said above entitled suit can be fully and justly determined as between said plaintiff and this petitioning defendant if the same shall be removed to the Circuit Court of the United States for the District of Kansas; and that said controversy between the plaintiff herein and this defendant, is a separable controversy, with respect to which separable controversy, the City of Leavenworth being defendant, in the above entitled cause, has no concern; and your petitioner offers herewith a good and sufficient bond for its entering into the Circuit Court of the United States in and for the District of Kansas, First Division, on the first day of the next session a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court if said Court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner prays this honorable court to proceed no further herein, except to make the order of removal required by law, and to accept the said surety upon the bond and to cause the said record herein to be removed to the Circuit Court of the United States in and for the District of Kansas, First Division, and your petitioner will ever pray.

21 WAGGENER, HORTON & ORR,
Attorneys for Defendant The Kansas City Northwestern Railroad.

STATE OF KANSAS, *County of Atchison, ss:*

W. P. Waggener, being first duly sworn, deposes and says that he is one of the duly authorized attorneys for the defendant, The Kansas City Northwestern Railroad Company; that he has read the within and foregoing petition for removal, and that the matters and things therein stated are true.

W. P. WAGGENER.

Subscribed and sworn to before me this 20th day of June, A. D. 1899.

[SEAL.] S. E. HARBURGER,
Notary Public.

My Commission expires on the 26th day of March, A. D. 1901.

In the District Court of Leavenworth County, Kansas.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Plaintiff,
vs.
THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY and THE CITY OF LEAVENWORTH, Defendants.

Bond for Removal.

Know All Men By These Presents: That the Kansas City Northwestern Railroad Company as principal, and C. S. Hetherington as surety, are holden and stand firmly bound unto Frederick Zimmerman, Administrator of the estate of L. Zimmerman, deceased, in the penal sum of $1,000, for the payment of which, well and truly to be made, unto the said Frederick Zimmerman, his heirs, assigns and successors in office, we bind ourselves, our heirs, successors representatives and assigns, jointly and severally, firmly by these presents, upon the condition nevertheless that;

Whereas the said The Kansas City Northwestern Railroad Company has petitioned the District Court of Leavenworth county, Kansas, for the removal of a certain cause therein pending, wherein said, Frederick Zimmerman administrator of the estate of L. Zimmerman, deceased, is plaintiff, and the said The Kansas City Northwestern Railroad Company, and the City of Leavenworth are defendants, to the Circuit Court of the United States, in and for the District of Kansas, First Division.

Now Therefore, if the said The Kansas City Northwestern Railroad Company shall enter in the Circuit Court of the United States for the District of Kansas, First Division, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States in and for the District of Kansas, First Division, if said court shall hold that said suit was wrongfully or [omproperly] removed thereto, then this obligation shall be void; otherwise to remain in full force and virtue.

In Witness Whereof, The Kansas City Northwestern Railroad Company as principal, and C. S. Hetherington as surety, have executed these presents this 21st day of June, A. D. 1899.

THE KANSAS CITY NORTHWESTERN RLD. CO.,
By W. P. WAGGENER, *Its Attorney.*

C. S. HETHERINGTON, *Surety.*

22 STATE OF KANSAS, *County of Atchison, ss:*

C. S. Hetherington, being first duly sworn on oath deposes and says, that he is the surety on the above bond; that he is a citizen and resident of the City and County of Atchison, State of Kansas, and that he is worth the sum of $10,000 exclusive of all debts, liabilities and exemptions.

C. S. HETHERINGTON.

Subscribed and sworn to before me this 21st day of June, A. D. 1899.

[SEAL.] S. E. HARBURGER,
Notary Public.

My Commission expires on the 26th day of March, 1901.

Indorsed: 13947 E. Fred Zimmerman, adm. Plaintiff, *vs.* The Kansas City Northwestern Rld. Co., Defendants. Petition for Removal and Bond. Filed June 28, 1899. James Gray, Clerk. By J. H. Kirmeyer, Deputy. Waggener, Horton & Orr, Attys. for Defendant.

THE STATE OF KANSAS,
First Judicial District, Leavenworth County, ss:

I, James Gray, Clerk of the District Court of the First Judicial District of the State of Kansas, sitting within and for the county aforesaid, do hereby certify *that* the above and foregoing to be a true full and correct transcript of the record in the therein entitled case as the same remains in my office.

Witness my hand and the seal of said court affixed at my office in the City of Leavenworth, this the 15th day of July, A. D. 1899.

[SEAL.] JAMES GRAY,
Clerk of the District Court.

Endorsed: No. 7719. No. 13947. District Court, Leavenworth county, Kansas. Frederick Zimmerman as administrator, &c. Plaintiff, *vs.* Kansas City Northwestern R. R. Co. *et al.*, Defendant. Transcript of Record. Petition, &c. Filed May 31st, 1899, James Gray, Clerk District Court. Filed Jul- 18, 1899. Geo. F. Sharitt, Clerk.

23 UNITED STATES OF AMERICA, *State of Kansas, ss:*

In the Circuit Court of the United States in and for the District of Kansas, First Division.

FREDERICK ZIMMERMAN, as Administrator of the Estate of L. Zimmerman, Deceased, Plaintiff,
vs.
KANSAS CITY & NORTH WESTERN RAILROAD COMPANY, Defendants.

Motion.

Now comes the above named plaintiff, and moves the court to grant leave to plaintiff to amend and recast the petition or bill filed herein, a transcript of which was filed by the defendants in their removal from the State Court and placed upon the equity side of this court (the same being an equity case) so that it may conform to the forms of equity pleadings and practice in this court.

JNO. H. ATWOOD AND
W. W. HOOPER,
Attorneys for Plaintiff.

Endorsed: No. 7719. Zimmerman, admr., etc., *vs.* K. C. N. W. R. R. Co. Motion for leave to amend & recast Bill to conform to equity. Filed Oct. 11, 1899. Geo. F. Sharitt, clerk.

24 UNITED STATES OF AMERICA, *State of Kansas, ss:*

In the Circuit Court of the United States in and for the District of Kansas, First Division.

FREDERICK ZIMMERMAN, as Administrator of the Estate of L. Zimmerman, Deceased, Plaintiff,
vs.
KANSAS CITY & NORTH WESTERN RAILROAD COMPANY ET AL., Defendants.

Journal Entry and Order.

Now on this 11th day of October, came the plaintiff herein by W. W. Hooper, his attorney and thereupon came on for hearing the plaintiff's motion heretofore filed herein on this day, for leave to amend and recast plaintiff's pleadings herein so as to conform to the forms and equity practice of this court; and the court after being fully advised in the premises now here sustains said motion.

It is therefore ordered that the plaintiff be and he is hereby granted leave to amend, recast and change his petition or bill, a transcript of which has been filed in this court by defendants, so that the same may conform to the forms and equity practice of this court, within thirty days from this date. And the defendants are

hereby given until the December Rules, 1899, to plead answer or demur thereto.

WILLIAM C. HOOK, *Judge.*

Endorsed: No. 7719. Zimmerman *vs.* K. C. N. W. R. R. Co. Order. Filed Oct. 11, 1899. Geo. F. Sharitt, clerk Jno. H. Atwood, and W. W. Hooper.

25 In the Circuit Court of the United States for the District of Kansas, First Division.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Plaintiff,
vs.
KANSAS CITY NORTHWESTERN RAILWAY COMPANY ET AL., Defendant.

Stipulation.

It is hereby stipulated by and between the parties hereto that the above named plaintiff may have thirty days from the 11th day of November, 1899, to amend and recast hi pleadings herein so as to conform to the equity practice of this court, and the defendant may have until the February rule day of this court to plead or answer in said cause.

JNO. H. ATWOOD AND
W. W. HOOPER,
Attorneys for Plaintiff,
WAGGENER, HORTON & ORR,
Attorneys for Defendant.

Endorsed: No. 7719. Stipulation. Filed Nov. 27, 1899. Geo. F. Sharitt, clerk.

26 In the Circuit Court of the United States for the District of Kansas, First Division.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Plaintiff,
vs.
THE KANSAS CITY, NORTHWESTERN RAILWAY COMPANY, & THE CITY OF LEAVENWORTH, Defendants.

To the Honorable Judges of the Circuit Court of the United States for the District of Kansas, First Division:

Frederick Zimmerman, administrator of the estate of L. Zimmerman, deceased, and a resident and citizen of Kansas, brought his action in the District Court of Leavenworth County, Kansas, against the above named defendants, The Kansas City Northwestern Railroad Company and the City of Leavenworth, also residents and

citizens of the State of Kansas, and upon the petition of the defendants, The Kansas City Northwestern Railroad Company the same was ordered removed from the District Court of said county to the Circuit Court of the United States for the District of Kansas, and a transcript of the record of said court was filed in said Circuit Court on the 18th day of July, 1899, and assigned to equity division of this court and upon leave first had and obtained from said court and by and with the consent of the defendants, leave was given plaintiff to amend, recast and file this pleading so as to conform to the equity practice thereof.

Your complainant further alleges that he is the duly appointed, acting and qualified administrator of the estate of Leonard Zimmerman, deceased, and that the Kansas City Northwestern Railroad Company, is a railroad company duly organized and existing under and by virtue of the laws, of the State of Kansas, and owns a railroad, engines, cars, etc., and is operating the same into and through the county and city of Leavenworth and through
27 other counties and cities in said State. That the said City of Leavenworth is a municipal corporation and city of the first class under the laws of the state of Kansas, and has been such during all the time hereinafter mentioned.

Your complainant further avers that on the 8th day of October, 1872 The Kansas City, Wyandotte & Northwestern Railroad Company, a corporation was duly organized and chartered for the purpose of constructing and maintaining a railroad and telegraph lines in connection therewith and the business of said railway company was to be transacted in the counties in the State of Kansas, through which said railroad and telegraph lines passed; and that on the 27th day of September, 1886, the Leavenworth and Olathe Railroad Company, a corporation, was duly organized and chartered for the purpose of constructing and maintaining and operating a standard and broad *guage* railroad extended and intended to be run through and from the city of Leavenworth, in the county of Leavenworth, Kansas, then southwesterly, through the counties of Leavenworth, Wyandotte and Johnson to the City of Olathe, in the last named county.

28 Your complainant further avers that after the organizing and chartering of the aforesaid companies, they proceeded to condemn, out a right of way, and build a railroad through and into the City and County of Leavenworth; that before the completion thereof and to-wit, on the 29th day of March, 1887, the said Kansas City, Wyandotte & Northwestern Railway Company and the Leavenworth & Olathe Railroad Company consolidated under the laws of the state of Kansas, as The Kansas City, Wyandotte & Northwestern Railroad Company, and in the articles of consolidation, the Kansas City, Wyandotte & Northwestern Railroad Company in writing accepted all the rights and privileges, and assumed all the obligations and liabilities of every nature and kind of the aforesaid companies, the Kansas City, Wyandotte & Northwestern Railway Company and the Leavenworth & Olathe Railroad Company; that thereafter said Kansas City, Wyandotte & Northwestern Railroad Company took

charge of all the property of the aforesaid two companies, accepted all the rights, franchises and privileges and assumed all the obligations and liabilities of the aforesaid two companies, and proceeded to complete, construct and build said railroad.

Your complainant further avers that said Leonard Zimmerman in his life time was the owner of fractional lot seven (7) in block seven (7) and lots six (6) and seven (7) in block eight (8) all in Fackler's Addition to the City of Leavenworth, Leavenworth county, Kansas; that Second street was a duly laid out and established graded street in the city of Leavenworth, running North and South, and running between blocks seven (7) and eight (8) block seven (7) lying on the East side of said Second street, and block eight (8) on the West side of said Second street; that said Zimmerman's property, to-wit, lot seven (7) faces Second street on the East and that said lot six (6) and fractional lot seven (7) face said Second street on the west.

Your complainant further avers that said Kansas City, Wyandotte & Northwestern Railroad Company, after acquiring the rights as aforesaid, proceeded to finish, construct, and build its road in a north-easterly direction through the city of Leavenworth until
29 it came to a point on the south line of fractional lot seven (7) of said L. Zimmerman's property and then without any right or authority, and without condemning the same, appropriated a part and portion of said fractional lot seven (7) and constructed its railroad in the same direction across and over that part or portion of said Second street immediately in front of said L. Zimmerman's property mentioned aforesaid; graded, raised and made a high embankment of a permanent nature and placed rails thereon the whole width of said street and thereby changed and raised the established grade of said Second street to a great heighth immediately in front of the above described property, and seriously and permanently impaired the egress and ingress to and from said property, and thereby damaging him in a great sum of money; as will more fully appear hereinafter.

Your complainant further avers that on the 2nd day of February, 1889 said L. Zimmerman, deceased, began his action against said Kansas City, Wyandotte and Northwestern Railroad Company, in the district court of Leavenworth county, Kansas, to recover damages for the aforesaid wrongs and that on the 15th day of May, 1897, he duly recovered in the above entitled court and cause judgment against the defendant, said Kansas City Wyandotte & Northwestern Railroad Company for the sum of Three thousand dollars, ($3,000.00) which judgment is unappealed from, unreversed, and now of full force and effect; all of which will more fully appear from a true copy of said judgment, hereto attached, made part hereof and marked "Exhibit A."

Your complainant further avers that afterwards and on the 7th day of May, 1898, said judgment was duly revived in the name of Frederick Zimmerman, Administrator of the estate of Leonard Zimmerman, deceased; all of which will more fully appear from a true

copy of the judgment order of revivor hereto attached, made a part hereof and marked "Exhibit B."

Your complainant further avers that during this time and about January 2, 1888, the said Kansas City, Wyandotte & Northwestern Railroad Company, mortgaged its said road, franchise and equipments to the Farmers Loan and Trust Company of New York, and that on or about March 21, 1890 the said Trust Company began its action in the Circuit Court of the United States for the Dis-
30 trict of Kansas, to foreclose its said mortgage, and that on or about the 18th day of June, 1891, a decree was entered against said Kansas City, Wyandotte & Northwestern Railroad Company foreclosing said mortgage and ordering said property to be sold unless within some short time thereafter, in said decree mentioned, said railroad company or some person or persons for them, should pay the amount of said mortgage indebtedness, with the expense and costs thereof, and that on or about the — day of —— 189– said railroad company and all its equipments, appurtenances, etc., were ordered to be sold and were on or about the — day of —— 189– duly sold to the defendant, the Kansas City, Northwestern Railroad Company, and that said defendant became the successor in interest to all the rights, franchises and privileges of said Kansas City, Wyandotte & Northwestern Railroad Company, and as part of the consideration assumed and was subject to all the liabilities of the Leavenworth & Olathe Railroad Company and the Kansas City, Wyandotte & Northwestern Railway Company *and the Kansas City, Wyandotte & Northwestern Railroad Company* under and by virtue of said decree and purchase.

And your complainant further avers that at said sale George C. Smith, and B. P. Waggener, became the purchasing trustee for said defendant company and that said Waggener was, at the time of the beginning of the foreclosure proceedings mentioned aforesaid, and at the time of the purchase at said sale, the attorney and counsellor for the Kansas City Wyandotte & Northwestern Railroad Company in the action in which said L. Zimmerman recovered judgment against the Kansas City Wyandotte and Northwestern Railroad Company and that at the execution and approval of the deed hereinafter mentioned he still was such attorney and had actual knowledge of the pendency of said action.

Your complainant further avers that thereafter the master making such sale made his report thereof and thereafter and on the 9th day of April, 1894, upon the consideration of such report and sale was confirmed by said court which order of confirmation, among other matters, contained the following provisions:

"And said master commissioner is ordered and directed to
31 make the purchasers at said sale, to-wit, George C. Smith and B. P. Waggener, purchasing trustees, a good and sufficient deed conveying the property mentioned and described in said report to such purchasers, said report being confirmed, however, subject to the provisions of said original decree and subject to the provisions to be contained in the deed executed by said Master Commissioner to said purchasers."

Your complainant further avers that afterwards and in consummation of said sale a deed was executed by the master to said George C. Smith and B. P. Waggener, the purchasers, at said sale, conveying the rights and franchises granted as aforesaid, to them which deed was on the 19th day of June, 1894, approved by the court subject to certain condition set forth in the order of approval which order was written upon the original deed and is in the following language:

"The foregoing deed examined and approved, subject to the condition that the purchaser take the property subject to all orders of the court relating to the payment of the debts of the company, and the receiver and said property shall remain liable for such debts, if any there are remaining unpaid."

HENRY C. CALDWELL,
U. S. Circuit Judge.

which deed was thereupon entered upon the records in the office of the Register of Deeds of Leavenworth county, Kansas, and thereafter said George C. Smith and B. P. Waggener conveyed said property including the rights of way and franchises mentioned aforesaid to the defendant, The Kansas City Northwestern Railway Company, for whom they were acting as trustees and your complainant further avers that said company has no right, title or interest, in or to such property save and except as it acquired by said conveyance.

Your complainant further avers that he is the representative of a judgment creditor of the Kansas City, Wyandotte & Northwestern Railroad Company and one of the persons in whose favor such reservation and proviso as embodied in the orders, decrees judgments, orders of confirmation, and deed mentioned aforesaid, and said orders decrees judgments order of confirmation and deed are records of this court and complainant refers to them and prays that he may use them as part hereof, or so much thereof, as is deemed
32 pertinent to the issues herein, as if they had been fully set out.

Your complainant further avers that the said Kansas City, Wyandotte & Northwestern Railroad Company has no property, either personal or real, or of any kind, or character upon which the aforesaid judgment can be made or execution levied thereon by your complainant, and the said Kansas City, Wyandotte & Northwestern Railroad Company is now and has been for years last past, execution proof.

Your complainant further avers that on the 17th day of November, 1886, the aforesaid Leavenworth & Olathe Railroad Company procured the Mayor and Council of the City of Leavenworth, Kansas, to pass an ordinance granting to said railroad company certain right of way privileges in the City of Leavenworth, and that in said ordinance said Leavenworth and Olathe Railroad Company was granted the right to cross Second street at some point south of the North line of Maple street; also over the south levee, Front street, and the South Esplanade, from the south line of Fackler's addition to the north line of Spruce, etc., and that as a condition for the grant and privilege mentioned in said ordinance, it was provided

that in all such cases "where the grade of any street or public ground is changed by said company or its successors it shall protect the City from cost and damage at the suits of the property owners; "all of which will more fully appear by a true copy of said ordinance hereto attached, and made a part hereof and marked "Exhibit C."

Your complainant further avers that on or about the 19th day of January, 1887, said Leavenworth & Olathe Railroad Company accepted the terms and agreed to the conditions provided and mentioned in said ordinance; and that in and by the article of consolidation mentioned aforesaid, The Kansas City, Wyandotte & Northwestern Railroad Company, assumed, accepted and agreed to all the terms, obligations and conditions of said ordinance and that under and by virtue of the decree of foreclosure and the purchase aforesaid and of accepting and operating said railroad under and by virtue of the ordinance of said city and its agreement to save the City of Leavenworth harmless from all damages sustained by property owners by reason of the construction of the railroad aforesaid, said defendant, The Kansas City Northwestern Railroad Company has become liable to said plaintiff for the amount of said judgment with interests and costs.

33 Your complainant further avers that long before the above judgment was obtained all the property of the Kansas City Wyandotte & Northwestern Railroad Company was under and by virtue of said decree sold to said defendant herein, the Kansas City Northwestern Railroad Company, and that under and by virtue of said decree and the ordinances of said city, said defendant, Kansas City Northwestern Railroad Company assumed and agreed to pay off any and all obligations of the said Kansas City Wyandotte and Northwestern Railroad Company and that under and by virtue thereof the Kansas City Wyandotte and Northwestern Railroad Company has turned over to said defendant Railroad Company all of its property rights and franchises, and has no property of any kind or description subject to execution and has refused to pay any part or portion of said judgment and that the same cannot be made on execution or by any means or process against the Kansas City, Wyandotte & Northwestern Railroad Company and that the said Kansas City, Wyandotte & Northwestern Railroad Company and defendant Kansas City Northwestern Railroad Company neglect and refuse to pay the aforesaid judgment or any part thereof although often thereunto requested.

Your complainant further avers that said defendant, The City of Leavenworth is permitting aiding, and assisting the Kansas City Northwestern Railroad Company, its co-defendant herein, in the operation and maintenance of said railroad within said city in violation of the plaintiff's rights and in violation of said ordinance and of the ordinances of said city and that it is permitting and aiding and assisting its co-defendant herein to run across said Second Street, and to maintain its embankments and tracks above the established grade of said Second Street to the heighth of two or three feet or more; all in violation of the aforesaid ordinance and the ordinances of said City, well knowing that the said defendant company or any

person or persons for them neglect and refuse to pay the aforesaid mentioned judgment or any part thereof or to duly compensate the said property owner for damages he has sustained by reason of the construction of said railroad and which said railroad companies, its successors, and assigns, have agreed to pay when they accepted the privileges and benefits of said ordinance.

34 Wherefore, your complainant prays and demands judgment against the defendants, The Kansas City Northwestern Railroad Company and the City of Leavenworth for the sum of Three thousand dollars ($3000.00) with interest thereon at the rate of six (6) per cent. per annum, from the 15th day of May, 1897, until paid and for costs of suit and your complainant further prays that said defendant the Kansas City Northwestern Railroad Company be required to pay the amount aforesaid as provided for by the orders, and decrees, deeds, etc., mentioned aforesaid, and that if it fails so to do that a receiver be appointed to take charge of its property, railroad cars, franchises equipments, etc., and manage, collect and run same under the order of the court, until sufficient funds have been collected to pay the amount with interest thereon as aforesaid, or that it be permanently enjoined and restrained from operating its said railroad over that part and portion of plaintiff's land appropriated as aforesaid, and from operating and maintaining said embankment across said Second street, in front of said plaintiff's property until it pays, or some person or persons for them, the aforesaid mentioned amount and compensate said plaintiff for the damage and property taken by the aforesaid mentioned Railroad Company and which obligations the said defendant in its purchase accepted and agreed to assume, and that if it is found in determining and adjudicating the rights of the parties hereto that other persons, parties or corporations have some interest herein, and that they are necessary parties to a complete adjudication and decision of the matters hereof, that they be brought in and made parties defendant and be required to set up their claim, if any and have all their rights and interest in the premises adjudicated and that they be declared junior and inferior to the rights, claims, and demands of the plaintiff herein and for all such other and further relief as in equity and good conscience the plaintiff may be entitled to in the premises.

JOHN H. ATWOOD AND
W. W. HOOPER,
Solicitors for Plaintiff.

____ ____,
Of Counsel.

35 UNITED STATES OF AMERICA,
District of Kansas, State of Kansas,
County of Leavenworth:

Frederick Zimmerman being first duly sworn depose- and says that he is the administrator of the estate of L. Zimmerman, deceased, and that he is the complainant in the foregoing bill of complaint,

and has read the same and knows the contents thereof; that the said bill is true of his own knowledge, except as to the matter stated to be on information and belief and as to this affiant verily believes it to be true.

FREDERICK ZIMMERMAN.

Subscribed and sworn to before me this 7th day of December A. D. 1899.

[SEAL.] LEE BOND,
Notary Public.

My Commission expires Sept 15th. 1902.

36 UNITED STATES OF AMERICA:

Be it remembered, That at the April Term A. D. 1897 of the District Court of the First Judicial District of the State of Kansas, sitting within and for the county of Leavenworth, in said State, begun and held in the City of Leavenworth, commencing on Monday the 19th day of April, A. D. 1897, Present the honorable Louis A. Myers, Judge, J. H. Rothenberger Sheriff, of Leavenworth county, Kansas and James Gray, Clerk: the following proceedings were had to-wit:

SATURDAY, *May 15th, A. D.* 1897.

Court met pursuant to adjournment.
Present as before.

No. 10568.

LEONARD ZIMMERMAN, Plaintiff,
against
THE KANSAS CITY, WYANDOTTE AND N. W. RAILROAD COMPANY, Defendant.

Now on this 15th day of May A. D. 1897 and during the regular April Term of the District Court of Leavenworth County, Kansas, came on for hearing the defendant's motion for a new trial in the above entitled action; the plaintiff being present by his attorneys Baker Hook & Atwood and the defendant by its attorneys W. P. Waggener and C. F. W. Dassler and the matters and things having been submitted to the court and after arguments of counsel the said motion for a new trial is overruled, defendant excepting, and Thereupon it is ordered adjudged and decreed that the said plaintiff do have and recover judgment of and from said defendant, for the sum of Three Thousand ($3000.00) dollars and for $— costs of suit and that execution issue therefor.

On application of the defendant the time within which to make and serve a case-made for the Supreme Court is hereby extended ninety (90) days from this date and the plaintiff is allowed 20 days thereafter in which to suggest amendments and the same to be settled on five days' notice by either party.

37 UNITED STATES OF AMERICA:

Be it remembered, That at the April Term A. D. 1898 of the District Court of the First Judicial District of the State of Kansas, sitting within and for the county of Leavenworth, in said State begun and held in the City of Leavenworth, commencing on Monday the 18th day of April A. D. 1898, Present the honorable Louis A. Myers, Judge, Peter Everhardy, Sheriff of Leavenworth County, Kansas and James Gray, Clerk; the following proceedings were had to-wit:

SATURDAY, *May 7th, A. D.* 1898.

Court met pursuant to adjournment.
Present as before.

No. 10568.

L. ZIMMERMAN, Plaintiff,
against
THE KANSAS CITY, WYANDOTTE AND NORTHWESTERN RAILROAD COMPANY, Defendant.

And now on this 7th day of May A. D. 1898 comes Fred Zimmerman, Administrator of the estate of L. Zimmerman deceased, by Baker Hook & Atwood, his attorneys and thereupon came on for hearing the motion of the said administrator heretofore filed herein to revive in the name of Fred Zimmerman as administrator of the estate of L. Zimmerman, deceased, this action and the judgment heretofore rendered in this action, on May 15th, 1897 in favor of the plaintiff, L. Zimmerman and against the defendant The Kansas City Wyandotte and N. W. R. R. Co.; and it appearing to the court that he defendant herein has been duly and legally served with a notice of said motion and that they failed to appear either in person or by an attorney or to show any cause why said motion should not be sustained.

It is therefore now by the court considered ordered and adjudged that Fred Zimmerman as Administrator of the estate of L. Zimmerman deceased be and he is hereby substituted as plaintiff herein with all the rights of the said plaintiff and that this action
38 and the orders and judgment rendered herein stand revived and hereafter proceed in the name of the said Fred Zimmerman as Administrator of the estate of L. Zimmerman deceased and that he as such administrator have and recover of and from said defendant herein the sum of $3000.00 with interest thereon at the rate of 6% per annum from the 15th day of May 1897 until paid and also the costs in this suit and that execution issue therefor.

STATE OF KANSAS, *Leavenworth County, ss:*

I, James Gray, Clerk of the District Court of the First Judicial District of the State of Kansas, sitting within and for the county

aforesaid, do hereby certify the above and foregoing to be — true full and complete copy of the journal entry of the order of court reviving this action and judgment in name of Fred Zimmerman as administrator of the estate of L. Zimmerman, in the therein entitled cause, as the same remains of record in my office.

Witness my hand and the seal of said court affixed at my office in the City of Leavenworth, this the 24th day of May A. D. 1899.

JAMES GRAY, *Clerk,*
By J. H. KIRMEYER,
Deputy Clerk.

39 *Ordinance No.* 1296.

An Ordinance Granting Certain Rights of Way and Privileges to the Leavenworth and Olathe Railroad Company.

Be it ordained by the Mayor and Councilmen of the City of Leavenworth, Kansas:—

SECTION 1. That the right to construct and operate a single line of railway track be and is hereby granted to the Leavenworth & Olathe Railroad Company for a period of 20 years from and after the passage of this ordinance; over and upon the following streets and public grounds of the city of Leavenworth, to-wit: Across Limit street on the Southern boundary of the city; also across Second street at some point south of the north line of Maple street; also over the south levee, front street, and South Esplanade, from the south line of Fackler's addition to the north line of Pine street; also across Spruce and Olive streets, east of Main street and also across all other public grounds east of Main street, from the north line of Olive street, northward to a point north of Choctaw street, to connect with the tracks of the Leavenworth Depot and Railroad Company.

SECTION 2. That the grant herein made is upon the following conditions: The right is reserved and given to the Mayor and council of this city to allow other railroad companies to use the right of way of the Leavenworth and Olathe Railroad Company from said Limit street to said point of connection with the track of said Leavenworth Depot & Railroad company and any track laid on said right of way, such company or companies to pay the Leavenworth & Olathe Railroad Company a proportionate amount of the costs of the construction and maintainance of the same, and of the cost of such right of way. All differences between said companies as to the amount to be paid, and the manner of use to be determined by representatives one to be selected by each company and in case such two representatives cannot agree thereon, or said Leavenworth & Olathe Railroad company neglects to name its representative, then the mayor and council of this city shall designate another arbitrator who shall act with the others in determining the points of difference. Said
40 Leavenworth & Olathe Railroad Company in crossing said streets shall so grade the approach on each side of its track as to permit easy and safe crossing of the same and when practicable,

shall pass under the grade of the street and shall bridge such cut for the passage of pedestrians and vehicles on the street. In all such cases where the grade of any street or public ground is changed by said company, it shall protect the city from cost and damage at the suits of property owners. All questions as to the manner of construction of said railroad over the right of way herein granted and concerning the protection of the streets and public grounds, and the safety and convenience of the passage of people and vehicles over the same shall be determined by the engineer of said company and the city engineer and the differences between them shall be determined by the mayor and council of this city. Unless said company shall construct and operate its track over the right of way herein granted within one year from the passage of this ordinance all rights under this ordinance shall be forfeited without further action on the part of the city.

Provided That if said company shall be delayed in the construction of its said road in the city of Leavenworth by an injunction or other litigation, the time that said company shall be so delayed shall not be computed as a part of the year within which it is required to construct and operate over the right of way herein granted, but said company shall have within which to construct its said track, one year exclusive of the time it may be so delayed by injunction or other litigation. Said company shall by writing accept the terms and conditions of this ordinance within twenty days from the passage thereof.

SECTION 3. That this ordinance shall take effect and be in force from and after its approval and publication.

Approved November 17th A. D. 1886.

S. F. NEELY, *Mayor.*

Attest:

WM. SHEPHERD, *City Clerk.*

Passed November 17th A. D. 1886.
Published November 18th A. D. 1886.

41 Endorsed: No. 7719. Fred Zimmerman, administrator &c. *vs.* Kansas City Wyandotte and Northwestern R. R. Co. *et al.* Recast and Amended Complaint. In Equity. Filed Dec. 8, 1899 Geo. F. Sharitt, clerk.

42 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 7719.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Plaintiff,

vs.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY ET AL., Defendant-.

Upon the application of the complainant herein, leave is hereby given to him to amend his recast and amended complaint, filed

herein, on December 8, 1899, by attaching thereto his verification thereof, instanter, which is done.

WILLIAM C. HOOK, *Judge.*

December 20, 1899.

Endorsed: No. 7719. Order. Filed Dec. 20, 1899. Geo. F. Sharitt, clerk.

43 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 7719.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Plaintiff,

vs.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY and THE CITY OF LEAVENWORTH, Defendants.

The Demurrer of the Kansas City Northwestern Railroad Company, Defendant, to the Recasted and Amended Bill of Complaint of Frederick Zimmerman, Administrator of the Estate of L. Zimmerman, Deceased, Complainant.

This defendant, by protestation, not confessing, or acknowledging all or any of the matters and things in said complainant's recasted and amended bill of complaint to be true in such manner and form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrer showeth,—that the said complainant has not, in and by said recasted and amended bill, made or stated such a cause as doth or ought to entitle him to any such discovery or relief as is thereby sought and prayed for from or against this defendant.

2. That it appears by the complainant's own showing by the said recasted and amended bill of complaint, that he is not entitled to the relief prayed by the bill against this defendant.

3. That the said recasted and amended bill of complaint is exhibited against this defendant, and against the City of Leavenworth as a defendant upon several distinct and independent matters and causes, which have no relation to each other, and in which, or in the greater part of which this defendant is in no way interested or concerned and ought not to be implicated.

4. That the said recasted and amended bill is exhibited not
44 only against this defendant, but also against the City of Leavenworth, which is a municipality of the State of Kansas and a citizen and resident of the State of Kansas and, this court has no jurisdiction in this suit over said city, and by reason of making the said City of Leavenworth a defendant, the said recasted and amended bill is drawn out to a considerable length, and this defendant is compelled to take a copy of the whole thereof, and by joining the separate and distinct matters together which do not

depend upon each other, the proceedings in the progress of the said suit will be intricate and prolix, and this defendant put to unnecessary charges and expenses in matters which in no way relate to or concern it.

Wherefore, this defendant demands the judgment of this honorable court whether it shall be compelled to make further or other answer to the said recasted and amended bill or any of the matters and things therein contained, and prays to be hence dismissed with its reasonable costs in this behalf sustained.

WAGGENER, HORTON & ORR,
Solicitors for the Kansas City Northwestern Railroad Company, Defendant.

ALBERT H. HORTON,
Of Counsel.

STATE OF KANSAS, *County of Shawnee, ss:*

Albert H. Horton makes solemn oath, and says that he is an attorney and agent of the Kansas City Northwestern Railroad Company one of said defendants, and that the foregoing demurrer is not interposed for delay.

ALBERT H. HORTON.

Sworn to and subscribed before me this 30th day of December A. D. 1899.

[SEAL.] D. H. MARTIN,
Notary Public.

My Commission expires Sept. 6th, 1903.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

ALBERT H. HORTON,
Of Counsel for the Kansas City Northwestern Railroad Company, Defendant.

45 Endorsed: No. 7719. U. S. Circuit Court. Frederick Zimmerman administrator &c. *v.* Kansas City N. W. Railroad Company, *et al.* Demurrer to the Re-casted and amended Bill of Complaint. Filed Dec. 30, 1899. Geo. F. Sharitt Clerk. Waggener, Horton & Orr, for K. C. N. W. R. R. defendant.

46 STATE OF KANSAS, *Leavenworth County, ss:*

In the Circuit Court of the United States for the District of Kansas, First Division.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Plaintiff,

THE KANSAS CITY & NORTHWESTERN RAILROAD COMPANY and THE CITY OF LEAVENWORTH, Defendants.

Now comes the City of Leavenworth especially appearing for the purposes of this motion only, and objects to this court assuming juris-

diction of this cause so far as the defendant, The City of Leavenworth is concerned, for the reason that the defendant, The City of Leavenworth is a City of the first class in the State of Kansas, having been joined as one of the defendants in this cause and that plaintiff is also a citizen of the State of Kansas, and moves the court to remand this cause to the District Court of Leavenworth county.

JNO. T. O'KEEFE,
Attorney for Defendant The City of Leavenworth Especially Appearing for the Purposes of this Motion Only.

Endorsed: No. 7719 Fred Zimmerman *vs.* The Kansas City and Northwestern Ry. Co. and The City of Leavenworth Motion of City of Leavenworth to remand Filed Oct. 16, 1900 Geo. F. Sharitt, clerk.

47 In the U. S. Circuit Court for the District of Kansas.

No. —.

FREDERICK ZIMMERMAN, Administrator of the Estate of Leonard Zimmerman, Deceased, Complainant,
vs.
THE KANSAS CITY NORTHWESTERN RAILWAY COMPANY and THE CITY OF LEAVENWORTH, Def'ts.

Order.

On this 18th day of April, 1901 came the complainant herein by W. W. Hooper his attorney and also came the defendant the Kansas City Northwestern Railway Company by Albert H. Horton Esq., its attorney and thereupon the complainant dismissed from this cause without prejudice the defendant the City of Leavenworth.

Now therefore, it is by the court ordered that the defendant the City of Leavenworth be dismissed from this without prejudice and that it have and recover of and from complainant all its costs herein taxed at $—.

Thereupon and on the application of the defendant the Kansas City Northwestern Railway Company leave is hereby given said defendant to withdraw its demurrer heretofore filed herein, which is done.

And upon the application of the complainants and for good cause shown leave is hereby given him to file an amended Bill of Complaint herein within thirty days from this time and the defendant is hereby given thirty days thereafter to plead answer or demurrer thereto defendant excepts however to the jurisdiction of this court in this cause.

JNO. F. PHILLIPS, *Judge.*

Endorsed: No. 7719 Zimmerman *vs.* K. C. N. W. Ry. Order. Filed Apl. 18, 1901 Geo. F. Sharitt, clerk.

48 In the Circuit Court of the United States for the District of Kansas, First Division.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Plaintiff,

vs.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, Defendant.

Amended Bill of Complaint.

To the Honorable Judges of the Circuit Court of the United States for the District of Kansas, First Division:

1. Your complainant, Frederick Zimmerman, Administrator of the estate of L. Zimmerman, deceased, and a resident and citizen of Kansas, brought his action in the District Court of Leavenworth county, against the above named defendant, The Kansas City, Northwestern Railroad Company, and the City of Leavenworth, also residents and citizens of the State of Kansas, and upon the petition of the Defendant, The Kansas City, Northwestern Railroad Company, claiming that this controversy involved the construction of orders, judgments and decrees of this court rendered and entered in the case of the Farmers Loan & Trust Company of New York, against the Kansas City, Wyandotte & Northwestern Railroad Company being case numbered — of this court, the same was ordered removed from the District court of said county to this Circuit Court of the United States for the District of Kansas, and a transcript of the record of said District court was filed in said circuit court on the 18th day of July, 1899, and assigned to the [quity] division of this court and upon leave first had and obtained from said court, and by and with the consent of the said defendants, leave was given complainant to amend, recast and file his pleadings so as to conform to the -quity practice thereof. That thereafter and on the 19th day of April, 1901, your said complainant dismissed from this cause without prejudice, the city of Leavenworth, and at the same time leave was given the said complainant to file this, his amended bill of complaint herein within thirty days from said date.

Your complainant further alleges that Leonard Zimmerman died in Leavenworth County, Kansas, on the 9 day of July, 1897, and that said complainant is the duly appointed, authorized, qualified and acting Administrator of the estate of said Leonard Zimmerman and has been such ever since the 16 day of July, 1897, long prior to the commencement of this action, and that the Kansas City, Northwestern Railroad Company is a corporation duly organized and existing under and by virtue of the laws of the state of Kansas, and own a railroad, engines, cars, etc., and is operating the same into and through the County and City of Leavenworth and through other counties and cities in said state acquired and operated as hereinafter stated.

3. Your complainant further avers that on the 8th day of October,

1872, the Kansas City, Wyandotte & Northwestern Railway Company a corporation was duly organized and chartered for the purpose of constructing and maintaining a railroad and telegraph lines in connection therewith, and the business of said railroad company was to be transacted in the counties in the State of Kansas, through which said railroad and telegraph lines passed; and that on the 27th day of September, 1886 the Leavenworth & Olathe Railroad Company, a corporation was duly organized and chartered for the purpose of constructing and maintaining and operating a standard and broad *gua*ged railroad extended and intended to be run through and from the City of Leavenworth in the County of Leavenworth, Kansas, then southwesterly through the counties of Leavenworth, Wyandotte and Johnson to the City of Olathe, in the last named county.

4. Your complainant further avers that after the organization and chartering of the aforesaid companies, they proceeded to condemn and lay out a right of way and build a railroad through and into the City and county of Leavenworth; that before the completion thereof, and to-wit on the 29th day of March 1887, The Said Kansas City, Wyandotte & Northwestern Railway Company, and the Leavenworth & Olathe Railroad Company consolidated under the laws of the State of Kansas, as the Kansas City Wyandotte &
49 Northwestern Railroad Company, and in the articles of consolidation, the Kansas City, Wyandotte & Northwestern Railroad Company in writing accepted all the rights and privileges and assumed all obligations and liabilities of every nature and kind of the aforesaid companies, The Kansas City, Wyandotte & Northwestern Railway Company and the Leavenworth & Olathe Railroad Company; that thereafter said Kansas City Wyandotte & Northwestern Railroad Company took possession and charge of all the property, rights and franchises of the aforesaid two companies, and accepted all the rights, franchises and privileges, and assumed all the obligations and liabilities of the aforesaid two companies, and proceeded to complete, construct and build said railroad.

5. Your complainant further avers that said Leonard Zimmerman in his lifetime was the owner of fractional lot seven (7) in Block seven (7) and lots six (6) and seven (7) in Block eight (8) all in Fackler's addition to the City of Leavenworth, Leavenworth county, Kansas; that Second Street, was a duly laid out and established graded street in said City of Leavenworth, running north and south, and running between Blocks seven (7) and eight (8); Block seven (7) lying on the east side of Second Street; and Block eight (8) on the west side of said Second street that said Zimmerman's property, to-wit, Lot seven (7) faces Second Street on the east, and said lot six (6) and fractional Lot seven (7) face said Second street on the west, and that said Zimmerman owned said lots and the grade of said street was established long prior to the acquiring of any right of way by said companies; or either of them.

6. Your complainant further avers that said Kansas City, Wyandotte & Northwestern Railroad Company, after acquiring the rights aforesaid, proceeded to finish, construct and build its road in a northeasterly direction through the City of Leavenworth until it

came to a point on the south line of fractional lot seven (7) of said Zimmerman's property, and then without any right or authority, and without condemning the same, appropriated a part and portion of said fractional Lot seven (7) and constructed its railroad in the same direction across and over that part and portion of said Second Street immediately in front of said L. Zimmerman's property mentioned aforesaid; graded, raised and made a high embankment of a permanent nature, the whole width of said Second Street, and placed iron rails thereon, and thereby changed and raised the established grade of Second street, as long prior thereto established by said City of Leavenworth, to a great heighth, to-wit, three feet, immediately in front of the above described property, and seriously and permanently impaired the egress and ingress to and from said property, and thereby damaging him in a great sum of money, as will more fully appear hereafter.

7. Your complainant further avers that on the 2nd day of February, 1889, said L. Zimmerman, now deceased, began his action against said Kansas City, Wyandotte & Northwestern Railroad Company, in the District Court of Leavenworth county, Kansas, to recover damages for the aforesaid wrongs and that on the 15th day of May, 1897, he duly recovered in the above entitled court and cause judgment against the defendant, said Kansas City Wyandotte & Northwestern Railroad Company, for the sum of Three Thousand Dollars ($3,000.00) with interest thereon from said date at the rate of 6 per cent. per annum until paid, for damages sustained by reason of the appropriation of his land, and the construction of the railroad as aforesaid, which judgment is unappealed from, unreversed, and now of full force and effect; all of which will more fully appear from a true copy of said judgment, hereto attached, made part hereof and marked "Exhibit A."

8. Your complainant further avers that afterwards and on the 7th day of May, 1898, said action and judgment was duly revived as provided by law, in the name of Frederick Zimmerman, Administrator of the estate of Leonard Zimmerman, deceased; all of which will more fully appear from a true copy of the judgment order of revivor hereto attached, made a part hereof, and marked "Exhibit B."

50 Your complainant further avers that during this time and about January 2, 1888, the Kansas City, Wyandotte & Northwestern Railroad Company executed and delivered to the Farmer's Loan & Trust Company of New York, a deed of trust, or mortgage, on its said railroad, right of way, tracks, equipments and franchises, that is, such of its said railroad, right of way, tracks, improvements, equipments and franchises as it owned, and had paid for and acquired at the time of the execution of said deed of trust, or mortgage.

9. And your complainant further avers that at the time of the execution and delivery of said deed of trust, or mortgage, to said Farmer's Loan & Trust Company, of New York, the said Kansas City, Wyandotte & Northwestern Railroad Company, had not acquired the title to the right of way over the land and the street immediately in front of said premises appropriated as aforesaid, and had not compensated said property owner for the damages sustained

by him as aforesaid, and that at the time of the execution of said deed of trust, or mortgage, the said Kansas City, Wyandotte & Northwestern Railroad Company had no title to said right of way, and could not give any lien thereon, that was prior and paramount to the claim and lien of said L. Zimmerman, for compensation for the land appropriated and damages sustained by him as above stated, and that the said Farmer's Loan & Trust Company did not, under and by virtue of their deed of trust, or mortgage, acquire any lien, right or title that is prior to the lien, claim and right of said plaintiff, to be compensated for his land appropriated and the damages sustained by him as above stated.

10. Your complainant further avers that on or about March 31st, 1890, the said Farmer's Loan & Trust Company of New York, commenced its action in the Circuit Court of the United States for the District of Kansas, to foreclose its said deed of trust, or mortgage, and that on or about the 18th day of June, 1893, a decree was entered against said Kansas City, Wyandotte & Northwestern Railroad Company, foreclosing said deed of trust, or mortgage, and ordering that said property, described in said deed of trust or mortgage be sold, unless within some short time thereafter in said decree mentioned, said railroad company, or some person or persons for it should pay the amount of said mortgage indebtedness, with the expenses and costs thereof; that thereafter and on or about the — day of ——, 1894, said property was sold to George C. Smith, and B. P. Waggener, who were the agents and purchasing trustees for the said defendant Company.

11. Your complainant further avers that after making of said sale, the Master making the same duly made his report thereon, and on the 9th day of April, 1894, upon the consideration of such report said sale was confirmed by said court and which said order of confirmation among other matters contained the following provision:

"And said master commissioner is ordered and directed to make the purchasers at said sale, to-wit, George C. Smith and B. P. Waggener, purchasing trustees, a good and sufficient deed, conveying the property mentioned and described in said report, to such purchasers, said report being confirmed, however, subject to the provisions of said original decree and subject to the provisions to be contained in the deed executed by said master commissioner to said purchasers."

12. Your complainant further avers that afterwards and in consummation of said sale a deed was executed by the master to said George C. Smith and B. P. Waggener, the purchasers at said sale, conveying to them the premises mentioned in said foreclosure decree which deed was on the 18th day of June, 1894, approved by the court subject to certain conditions set forth in the order of approval, which order was written or a part thereof upon the original deed and is in the following words and figures:

"The foregoing deed examined and approved subject to the condition that the purchaser take the property subject to all orders of the court relating to the payment of the debts of the company, and

the receiver, and said property shall remain liable for such debts, if any there are remaining unpaid."

HENRY C. CALDWELL,
U. S. Circuit Judge.

51 which deed was thereupon entered upon the records in the office of the Register of Deeds of Leavenworth County, Kansas, and thereafter said George C. Smith and B. P. Waggener, conveyed said property to the defendant, The Kansas City, Northwestern Railroad Company, for whom they were acting as Trustees, and your complainant further avers that said company has no right, title or interest in or to such property save and except as it acquired by said conveyance.

13. Your complainant further avers that said B. P. Waggener, one of the purchasing Trustees at such foreclosure sale, was at the time of the beginning of the foreclosure proceedings mentioned above, and at the time of purchasing the property at such sale, the general attorney and counsellor for the Kansas City, Wyandotte & Northwestern Railroad Company, and was one of the attorneys of record for the defendant in the action in which said L. Zimmermen, now deceased, recovered judgment against the Kansas City, Wyandotte & Northwestern Railroad Company, as mentioned above, and at the execution and approval of the deed conveying to the said trustees said premises and the deed to said defendant, was still such attorney, and had actual knowledge of the pendency of said action in the District Court of Leavenworth County, Kansas, and of the nature and extent thereof and what was claimed by said plaintiff in said action, and well knew that said plaintiff had not been compensated for his land appropriated and the damages sustained by him in such appropriation, and the construction of such embankment, and the changing of the established grade of such street, immediately in front of said premises, and said trustees, nor said defendant company, are not innocent purchasers of said right of way, etc., for value, they at all times having knowledge and notice of said plaintiff's claims.

14. Your complainant further avers that he is the representative of judgment creditor of the Kansas City, Wyandotte & Northwestern Railroad Company, and one of the persons in whose favor the reservation and provision as embodied in the orders, decrees, judgments, orders of confirmation and deed mentioned aforesaid, and said orders, decrees, judgments order of confirmation, and deed are records of this court and complainant refers to them and prays that he may use them as part hereof or so much thereof as is deemed pertinent to the issues herein, as if they had been fully set out.

15. Your complainant further avers that on this 17th day of November, 1886, the aforesaid Leavenworth & Olathe Railroad Company, procured the Mayor and Council of the City of Leavenworth, Kansas, to pass an ordinance granting to said railroad company certain right of way privileges in the City of Leavenworth, and that in said ordinance said Leavenworth, and Olathe Railroad Company was granted the right to cross Second Street at some point south of

the north line of Maple Street; also over the south levee, Front street, and the south Esplanade, from the south line of Fackler's Addition to the north line of Spruce, etc., and that as a condition for the grant and privilege mentioned in said ordinance, it was provided that in all such cases "where the grade of any street or public ground is changed by said company or its successors, it shall protect the City from cost and damage at the suits of the property owners;" all of which will more fully appear by a true copy of said ordinance hereto attached and made a part hereof and marked "Exhibit C."

16. Your complainant further avers that on or about the 19th day of January, 1887, said Leavenworth & Olathe Railroad Company accepted the terms and agreed to the conditions provided and mentioned in said ordinance; and that in and by the articles of consolidation mentioned aforesaid, The Kansas City, Wyandotte & Northwestern Railroad Company, assumed accepted and agreed to all the terms, obligations and conditions of said ordinance and that under and by virtue of taking possession of said railroad and its tracks and continuing to operate the same over said plaintiff's premises appropriated and taken as aforesaid, the decree of foreclosure and the purchase aforesaid, and of accepting and operating said rail-
52 road under and by virtue of the ordinance of said city and its agreement to save the City of Leavenworth harmless from all damages sustained by property owners by reason of the construction of the railroad aforesaid, said defendant, The Kansas City Northwestern Railroad Company, has become liable to said plaintiff for the amount of said judgment with interests and costs.

17. Your complainant further avers that long before the above judgment was obtained all the property of the Kansas City Wyandotte & Northwestern Railroad Company was under and by virtue of said decree sold to said defendant herein, The Kansas City Northwestern Railroad Company, and that under and by virtue of taking possession of the right of way and operating its trains and cars over the land appropriated and across said street immediately in front of said premises, and continuing to keep possession and operating its tra-ns thereon and of said decrees and the ordinances of the said city, said defendant, The Kansas City Northwestern Railroad Company has assumed and become obligated to pay off any and all obligations of the said Kansas City, Wyandotte & Northwestern Railroad Company to said plaintiff for its right of way, and that under and by virtue thereof, the Kansas City, Wyandotte & Northwestern Railroad Company has turned over to said defendant railroad company all of its property rights and franchises, and has no property of any kind or description subject to execution and has refused to pay any part or portion of said judgment and that the same cannot be made on execution or by any means or process against the Kansas City, Wyandotte & Northwestern Railroad Company, and that the said Kansas City, Wyandotte & Northwestern Railroad Company, and defendant, Kansas City Northwestern Railroad Company neglect and refuse to pay the aforesaid judgment or any part thereof, although often thereunto requested.

In consideration whereof and for as much as your orator is remediless in the premises at and by the strict rule of the common law, and is only relievable in a court of equity where matters of this kind are properly recognizable and reviewable.

To The End Therefore, that your orator may have that relief which he can only obtain in a court of equity, and that the said defendant may answer the premises but not upon oath or affirmation, the benefit of which is expressly waived by your orator, now prays the court that a decree be rendered against the defendant, the Kansas City Northwestern Railroad Company for the sum of Three Thousand Dollars ($3,000.00) with interest thereon at the rate of six per cent. per annum from the 15th day of May, 1897, until paid, and for costs of suit, and your complainant further prays that said defendant The Kansas City, Northwestern Railroad Company, be required to pay the amount aforesaid, within some short time to be mentioned in said decree, and that if it fails to so do, that a Receiver be appointed to take charge of its property, railroad cars, franchises, equipments, etc., and to manage, collect and run same under the order of the court, until sufficient funds have been collected to pay said amount, with interest thereon as aforesaid, or that it be permanently enjoined and restrained from operating its said railroad over that part or portion of plaintiff's land appropriated as aforesaid, and from operating and maintaining said embankment across said Second street in front of said plaintiff's property until it pays, or some person or persons for them, the aforesaid mentioned amount and compensate said plaintiff for the damage and property taken by the aforesaid mentioned railroad company, and which obligations, the said defendant in its purchase and otherwise assumed and that if it is found in determining and adjudicating the rights of the parties hereto that other persons, parties, or corporations, have some interest herein and that they are necessary parties to a complete adjudication and decision of the matters hereof, that they be brought into court and made parties defendant and be required to set up [they] claim, if any, and have all their rights and interests in the premises adjudicated and that they be declared junior and inferior to the rights, claims and demands of the plaintiff herein, and for all such
53 other and further relief as in equity and good conscience the plaintiff may be entitled to in the premises.

WILLIAM W. HOOPER,
Solicitor for Plaintiff.

JNO. H. ATWOOD,
Of Counsel.

To the end that your orator may obtain the relief to which he is justly entitled in the premises he now prays the court to grant him due process by subpœna directed to the Kansas City Northwestern Railroad Company defendant hereinbefore named requiring and commanding it to appear herein and answer but not under oath, the same being expressly waived the several allegations in this your orator's bill of complaint contained.

——— ———,
Solicitor for Plaintiff.

——— ———,
Of Counsel.

UNITED STATES OF AMERICA, *District of Kansas, ss:*

On this 8th day of May, 1901, before me, personally appeared Frederick Zimmerman, the above named plaintiff who made solemn oath that he read the foregoing amended bill of complaint and knows the contents thereof, and that the same is true, of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

FREDERICK ZIMMERMAN.

Subscribed and sworn to before me this 8th day of May, 1901.

[SEAL.] J. H. ATWOOD, JR.,
Notary Public.

My Commission expires Dec. 26th, 1904.

"EXHIBIT A."

UNITED STATES OF AMERICA:

Be It Remembered, That at the April Term A. D. 1897 of the District Court of the First Judicial District of the State of Kansas, sitting within and for the county of Leavenworth, in said state, begun and held in the City of Leavenworth, commencing on Monday the 19th day of April A. D. 1897. Present the honorable Louis A. Myers, Judge, J. H. Rothenberger Sheriff of Leavenworth County, Kansas, and James Gray Clerk; the following proceedings were had to-wit:

SATURDAY, *May 15th, A. D.* 1897.

Court met pursuant to adjournment.
Present as before.

No. 10568.

LEONARD ZIMMERMAN, Plaintiff,
against
THE KANSAS CITY, WYANDOTTE AND N. W. RAILROAD COMPANY, Defendant.

Now on this 15th day of May A. D. 1897 and during the regular April Term of the District Court of Leavenworth county, Kansas came on for hearing the defendant's motion for a new trial in the above entitled action; the plaintiff being present by his attorneys Baker Hook & Atwood and the defendant by its attorneys W. P. Waggener and C. F. W. Dassler and the matters and things having been submitted to the court and after arguments of counsel the said motion for a new trial is overruled, defendant excepting, and Thereupon it is ordered adjudged and decreed that the said plaintiff do have and recover judgment of and from said defendant, for the sum of Three thousand ($3000.00) Dollars and for $— costs of suit and that execution issue therefor.

On application of the defendant the time within which to make and serve a case-made for the Supreme court is hereby extended

ninety (90) days from this date and the plaintiff is allowed 20 days thereafter in which to suggest amendments and the same to be settled on five days notice by either party.

54 "EXHIBIT B."

UNITED STATES OF AMERICA:

Be It Remembered, That at the April Term A. D. 1898 of the District Court of the First Judicial District of the State of Kansas, sitting within and for the county of Leavenworth, in said State, begun and held in the city of Leavenworth, commencing on Monday the 18th day of April A. D. 1898, Present the honorable Louis A. Myers, Judge, Peter Everhardy Sheriff of Leavenworth County, Kansas, and James Gray Clerk; the following proceedings were had to-wit:

SATURDAY, *May 7th, A. D.* 1898.

Court met pursuant to adjournment.
Present as before.

No. 10568.

L. ZIMMERMAN, Plaintiff,
against
THE KANSAS CITY, WYANDOTTE AND NORTHWESTERN RAILROAD COMPANY, Defendant.

And now on this 7th day of May A. D. 1898 comes Fred Zimmerman, Administrator of the estate of L. Zimmerman deceased, by Baker Hook & Atwood his attorneys and thereupon came on for hearing the motion of the said administrator heretofore filed herein to revive in the name of Fred Zimmerman as administrator of the estate of L. Zimmerman, deceased, this action and the judgment heretofore rendered in this action, on May 15th 1897 in favor of the plaintiff, L. Zimmerman and against the defendant The Kansas City Wyandotte and N. W. R. R. Co.; and it appearing to the court that the defendant herein has been duly and legally served with a notice of said motion and that they failed to appear either in person or by an attorney or to show any cause why said motion should not be sustained.

It is therefore now by the court considered ordered and adjudged that Fred Zimmerman as Administrator of the estate of L. Zimmerman deceased be and he is hereby substituted as plaintiff herein with all the rights of the said plaintiff and that this action and the orders and judgment rendered herein stand revived and hereafter proceed in the name of the said Fred Zimmerman as Administrator of the estate of L. Zimmerman deceased and that he as such administrator have and recover of and from said defendant herein the sum of $3000.00 with interest thereon at the rate of 6% per annum from the 15th day of May 1897 until paid and also the costs in this suit and that execution issue therefor.

STATE OF KANSAS, *Leavenworth County, ss:*

I, James Gray, Clerk of the District Court of the First Judicial District of the State of Kansas, sitting within and for the County aforesaid, do hereby certify the above and foregoing to be — true, full and complete copy of The Journal Entry of the order of Court reviving this action and judgment in name of Fred Zimmerman as administrator of the estate of L. Zimmerman in the therein entitled cause, as the same remains of record in my office.

Witness my hand, and the seal of said court affixed at my office in the City of Leavenworth, this the 24th day of May A. D. 1899.

[SEAL.] JAMES GRAY, *Clerk,*
By J. H. KIRMEYER,
Deputy Clerk.

"EXHIBIT C."

Ordinance No. 1296.

An Ordinance Granting Certain Rights of Way and Privileges to the Leavenworth and Olathe Railroad Company.

Be it ordained by the Mayor and Councilmen of the City of Leavenworth, Kansas:

55 SECTION 1. That the right to construct and operate a single line of railway track be and is hereby granted to the Leavenworth & Olathe Railroad Company for a period of 20 years from and after the passage of this ordinance; over and upon the following streets and public grounds of the City of Leavenworth, to-wit: Across Limit Street on the Southern boundary of the city; also across Second street at some point south of the north line of Maple street; also over the south Levee, Front street, and South Esplanade, from the south line of Fackler's addition to the north line of Pine street; also across Spruce and Olive streets, east of Main street and also across all other public grounds east of Main street, from the north line of Olive street, northward to a point north of Choctaw street, to connect with the tracks of the Leavenworth Depot and Railroad Company.

SECTION 2. That the grant herein made is upon the following conditions: The right is reserved and given to the Mayor and council of this city to allow other railroad companies to use the right of way of the Leavenworth and Olathe Railroad company from said Limit street to said point of connection with the track of said Leavenworth Depot & Railroad company and any track laid on said right of way, such company or companies to pay the Leavenworth & Olathe Railroad company a proportionate amount of the costs of the construction and maintenance of the same, and of the cost of such right of way. All differences between said companies as to the amount to be paid, and the manner of use to be determined by representatives one to be selected by each company and in case such two representatives cannot agree thereon, or said Leavenworth & Olathe Railroad Company neglects to name its representative, then the mayor and council

of this city shall designate another arbitrator who shall act with the others in determining the points of difference. Said Leavenworth & Olathe Railroad Company in crossing said streets shall so grade the approach on each side of its track as to permit easy and safe crossing of the same and when practicable shall pass under the grade of the street and shall bridge such cut for the passage of pedestrians and vehicles on the street. In all such cases where the grade of any street or public ground is changed by said company, it shall protect the city from cost and damage at the suits of property owners. All questions as to the manner of construction of said railroad over the right of way herein granted and concerning the protection of the streets and public grounds, and the safety and convenience of the passage of people and vehicles over the same shall be determined by the engineer of said company and the city engineer and the differences between them shall be determined by the mayor and council of this city. Unless said company shall construct and operate its track over the right of way herein granted within one year from the passage of this ordinance all rights under this ordinance shall be forfeited without further action on the part of the city. Provided That if said company shall be delayed in the construction of its said road in the city of Leavenworth by an injunction or other litigation, the time that said company shall be so delayed shall not be computed as a part of the year within which it is required to construct and operate over the right of way herein granted, but said company shall have within which to construct its said track, one year exclusive of the time it may be so delayed by injunction or other litigation. Said company shall by writing accept the terms and conditions of this ordinance within twenty days from the passage thereof.

SECTION 3. That this ordinance shall take effect and be in force from and after its approval and publication.

Approved November 17th A. D. 1886.

S. F. NEELY, *Mayor.*

Attest:

WM. SHEPHERD,
City Clerk.

Passed November 17th A. D. 1886.
Published November 18th A. D. 1886.

Indorsed: 7719. Frederick Zimmerman adm'r etc. *vs.* The Kansas City Northwestern Railroad Co. Amended Bill of Complaint. Filed May 9, 1901. Geo. F. Sharitt, Clerk.

56 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 7719.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Plaintiff,

v.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY and THE CITY OF LEAVENWORTH, Defendants.

The Demurrer of the Kansas City Northwestern Railroad Company, Defendant to the Amended Bill of Complaint of Frederick Zimmerman, Administrator of the Estate of L. Zimmerman, Deceased, Complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in said complainant's amended bill of complaint to be true in such manner and form as the same are therein set forth, and alleged, doth demur thereto, and for cause of demurrer showeth—that the said complainant has not, in and by said amended bill, made or stated such a cause of action as doth or ought to entitle him to any such discovery or relief as is thereby sought and prayed for from or against this defendant.

2. That it appears by the complainant's own showing by the said amended bill of complaint, that he is not entitled to the relief prayed for by the bill against this defendant.

3. That it appears from said amended bill of complaint that this suit was originally commenced in the District Court of Leavenworth county in the State of Kansas, to enforce certain alleged orders, judgments and decrees of this court rendered and entered in the case of The Farmers Loan & Trust Company of New York *v.* The Kansas City, Wyandotte & Northwestern Railroad Company, numbered in this court 6472, when said District court of Leavenworth county, Kansas, had no jurisdiction over said orders, judgments of decrees of

57 this court, and no power or authority to enforce or construe the same, and as said action or suit brought by the complainant in the District Court of Leavenworth county, Kansas, against this defendant was removed from said court to this court, this court upon said removal could not and would not have in this suit any other jurisdiction or power than that of the District Court of Leavenworth county, Kansas, in said suit, and hence, as this case was brought into this court from the state court, this court has no power upon the amended bill of complaint to enforce the said orders, judgments and decrees described and referred to in the petition originally filed in said court by the complainant against this defendant.

4. Upon the allegations of the said bill of complaint, including the orders decrees and judgments of this court described in the 14th paragraph of said amended bill, and which said orders, decrees and judgments are a part of said amended bill the same as if they had been fully set out and copied therein, the complainants are not en-

titled to any preference over the mortgage debts embraced in the mortgage referred to in said bill of January 2nd, 1888, and therefore the defendant is not liable for any part or portion of the judgment referred to in said amended bill of complaint against the Kansas City, Wyandotte & Northwestern Railroad Company.

5. As it appears from the amended bill of complaint, and the orders, decrees, orders of confirmation and deed mentioned therein as a part thereof, and as being rendered and entered in this court in Case No. 6472 of The Farmers Loan & Trust Company *v.* The Kansas City, Wyandotte & Northwestern Railroad Company, that said alleged judgment of May 15th, 1897 of Leonard Zimmerman *v.* The Kansas City Wyandotte & Northwestern Railroad Company for damages is not a preferential claim or debt contracted by the mortgagor company over the said mortgage of January 2nd, 1888, nor any claim contracted by the receiver in that suit or arising out of that suit, said defendant is not liable therefor, nor for any part thereof.

58 6. It does not appear in or from the averments of said amended bill that the said complainant is entitled, equitably or otherwise, from this defendant, to the payment of said sum of $3000 referred to in said judgment of May 15th, 1897, of Leonard Zimmerman *v.* The Kansas City Wyandotte & Northwestern Railroad Company.

Wherefore, this defendant demands the judgment of this honorable court whether it shall be compelled to make further or other answer to the said amended bill or any of the matters and things therein contained, and prays to be hence dismissed with its reasonable costs in this behalf sustained.

WAGGENER, HORTON & ORR,
Solicitors for the Kansas City Northwestern Railroad Company, Defendant.

ALBERT H. HORTON, *of Counsel.*

STATE OF KANSAS, *County of Shawnee, ss:*

Albert H. Horton makes solemn oath and says that he is an attorney and agent of the Kansas City Northwestern Railroad Company, one of said defendants, and that the foregoing demurrer is not interposed for delay.

ALBERT H. HORTON.

Subscribed and sworn to before me this 14" day of June A. D. 1901.

[SEAL.] D. H. MARTIN,
Notary Public.

My commission expires Sept. 6th, 1903.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

ALBERT H. HORTON,
Of Counsel for the Kansas City Northwestern Railroad Company, Defendant.

Endorsed: No. 7719. U. S. Circuit Court. Frederick Zimmerman, adm'r, &c. Compl't *v.* K. C. N. W. R'l'd Co. *et al.* Def'ts. Demurrer to Amended Bill. Filed Jun. 15, 1901 Geo. F. Sharitt, clerk Waggener, Horton & Orr, for defendant.

59 In the Circuit Court of the United States for the District of Kansas, First Division.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Plaintiff,

v.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY and THE CITY OF LEAVENWORTH, Defendants.

On application of the defendant leave is given to withdraw its demurrer filed June 15th, 1901, to the amended bill of complaint and to substitute therefore a new and amended bill of demurrer to said bill of complaint.

JOHN A. RINER, *Judge.*

Indorsed: No. 7719. Order. Filed Oct. 12, 1903. Geo. F. Sharitt, clerk.

In the Circuit Court of the United States for the District of Kansas, First Division.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Plaintiff,

v.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY and THE CITY OF LEAVENWORTH, Defendants.

The Amended Demurrer of the Kansas City Northwestern Railroad Company to the Amended Bill of Complaint of Frederick Zimmerman, Administrator of the Estate of L. Zimmerman, Deceased, Complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in said complainant's amended bill of complaint to be true in such manner and form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrer showeth—that the said complainant has not, in and by said amended bill, made or stated such a cause of action as doth or ought to entitle him to any such discovery or relief as is thereby sought and prayed for from or against this defendant.

2. That it appears by the complainant's own showing by the said amended bill of complaint, that he is not entitled to the relief prayed for by the bill against this defendant.

3. That it appears from said amended bill of complaint that this suit was originally commenced in the District Court of Leavenworth County in the State of Kansas, to enforce certain alleged orders, judgments and decrees of this Court rendered and entered in the case of The Farmers Loan & Trust Company of New York *v.* The Kansas City, Wyandotte & Northwestern Railroad Company, numbered in this court 6472, when said District Court of Leavenworth county, Kansas, had no jurisdiction over said orders, judgments or decrees of this court, and no power or authority to enforce or construe the same, and as said action or suit brought by the complainant in the District Court of Leavenworth County, Kansas, against this defendant was removed from said court to this court, this court upon said removal could not and would not have in this suit any other jurisdiction or power than that of the District Court of Leavenworth County, Kansas, in said suit, and hence, as this case was brought into this court from the state court, this court had no power upon the amended bill of complaint to enforce the said orders, judgments and decrees described and referred to in the petition originally filed in said court by the complainant against this defendant.

4. Upon the allegations of the said bill of complaint, including the orders, decrees and judgments of this court described in the 14″ paragraph of said amended bill, and which said orders, decrees and judgments are a part of said amended bill the same as if they had been fully set out and copied therein, the complainants are not entitled to any preference over the mortgage debts embraced in the mortgage referred to in said bill of January 2″, 1888, and therefore the defendant is not liable for any part or portion of the judgment referred to in said amended bill of complaint against the Kansas City, Wyandotte & Northwestern Railroad Company.

60 5. As it appears from the amended bill of complaint, and the orders decrees, orders of confirmation and deed mentioned therein as a part thereof, and as being rendered and entered in this Court in case No. 6472 of The Farmers Loan & Trust Company *v.* The Kansas City Wyandotte & Northwestern Railroad Company, that said alleged judgment of May 15″, 1897, of Leonard Zimmerman *v.* The Kansas City, Wyandotte & Northwestern Railroad Company for damages is not a preferential claim or debt contracted by the mortgagor company over the said mortgage of January 2″, 1888, nor any claim contracted by the receiver in that suit, or arising out of that suit, said defendant is not liable therefor, nor for any part thereof.

6. It does not appear in or from the averments of said amended bill that the said complainant is entitled, equitably or otherwise, from this defendant, to the payment of said sum of $3,000 referred to in said judgment of May 15″, 1897 of Leonard Zimmerman *v.* The Kansas City, Wyandotte & Northwestern Railroad Company.

7. That it appears in and by said amended bill that the liability of the said defendant The Kansas City Northwestern Railroad Company to the complainant, if any at all, is not enforce-able by said bill in an independent action such as complainant herein has brought,

but is enforc-able, if at all, in the original action in said amended bill mentioned, to-wit, the action by The Farmers Loan & Trust Company *v.* The Kansas City, Wyandotte & Northwestern Railroad Company to foreclose the mortgage executed by the said defendant to the said complainant in that cause and as ancillary to and a part of the relief which might have been or might be administered in said cause.

Wherefore, this defendant demands the judgment of this honorable court whether it shall be compelled to make further or other answer to the said amended bill or any of the matters and things therein contained, and prays to be hence dismissed with its reasonable costs in this behalf sustained.

WAGGENER, DOSTER & ORR,
Solicitors for the Kansas City Northwestern Railroad Company, Defendant.

STATE OF KANSAS, *County of Shawnee, ss:*

Frank Doster makes solemn oath and says that he is an attorney and agent of the Kansas City Northwestern Railroad Company, one of said defendants, and that the foregoing demurrer is not interposed for delay.

FRANK DOSTER.

Subscribed and sworn to before me this — day of ——, 1903.

——— ———,
Notary Public.

My Commission Expires ——, ——.

Indorsed: No. 7719. United States Circuit Court. Frederick Zimmerman, Adm'r, *v.* K. C. N. W. Rld. Co. Amended Demurrer to Amended Bill. Filed Oct. 12, '03. Geo. F. Sharitt, clerk. Waggener, Doster & Orr, for K. C. N. W. R. R. Co.

61 In the Circuit Court of the United States for the District of Kansas, First Division.

FREDERICK ZIMMERMAN, Administrator of the Estate of Leonard Zimmerman, Deceased, Complainant,
vs.
THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, Defendant.

Motion.

Now comes the above named plaintiff and moves the court to remand this case to the District court of Leavenworth county, Kansas, for the reason that this court has no jurisdiction to hear or try same.

JNO. H. ATWOOD, AND
WILLIAM W. HOOPER,
Attorneys for Complainant.

Indorsed: No. 7719. Frederick Zimmerman etc. *vs.* Kansas City N. W. R. R. Co. Motion. Filed Ap'l 14, 1904. Geo. F. Sharitt, Clerk.

In the Circuit Court of the United States for the District of Kansas, First Division.

No. 7719. Equity.

FREDERICK ZIMMERMAN, Administrator,
vs.
KANSAS CITY NORTHWESTERN RAILROAD COMPANY.

Memoranda of Opinion.

The foundation of complainant's demand against the defendant railroad company is the judgment of three thousand dollars obtained by complainant's intestate against The Kansas City, Wyandotte and Northwestern Railroad Company in the state court. If complainant may compel satisfaction of that judgment, or any part of it, against the defendant railroad company as assignee of the purchasing committee which purchased the property of the Kansas City, Wyandotte and Northwestern Railroad Company at a foreclosure sale of that property, it is by reason of the terms of the decree entered in the federal circuit court under which the purchase was made and by reason of the terms of the deed based upon that decree by which the purchasing committee took title to the property. That decree referred to in complainant's amended bill of complaint, expressly provides, as follows:

"This court hereby reserves to itself from this decree the power and jurisdiction both as against the parties to this suit and as against said purchaser at said contemplated sale to hear and adjudicate all pending and undetermined claims hereafter presented, whether contracted by the receiver or the mortgagor company before the commencement of this suit, and to determine as to said claims whether they are or are not valid and entitled to priority over the mortgage debts hereinbefore referred to, and to make all such orders and supplementary decrees touching said claims and demands as may be deemed proper, etc."

Hence, in my judgment, the district court of Leavenworth county, had no jurisdiction to either enforce the judgment in suit against the assignee of the purchaser under such decree or to determine the validity and extent of the judgment now in suit, or to establish such judgment as a lien on the property purchased under the decree superior to the mortgage liens therein foreclosed, and that this court by removal of this cause from the state court acquired only such jurisdiction and power to determine as the state court possessed and might have exercised had no removal been obtained. That the proper method of obtaining satisfaction of the judgment in suit from the defendant company or out of the property of the Kansas City, Wyandotte and Northwestern Railroad by it purchased under the decree, if any such may be obtained by complainant, is by intervention in the original foreclosure suit in which the decree relied upon by complainant was entered.

It follows, the motion to remand to the state court must be denied and the amended demurrer to the amended bill of complaint must be sustained, with leave to apply to this court for leave to
62 file an intervening petition in the original suit of The Farmers' Loan & Trust Company of New York against The Kansas City, Wyandotte and Northwestern Railroad Company, *et al.*, number 6472 equity on the dockets of this court.

JOHN C. POLLOCK, *Judge.*

Indorsed: No. 7719. Memo. of Opinion. Filed April 23, 1904. Geo. F. Sharitt, Clerk.

In the Circuit Court of the United States for the District of Kansas, First Division.

No. 7719. Equity.

FREDERICK ZIMMERMAN, Administrator,
v.
KANSAS CITY NORTHWESTERN RAILROAD COMPANY ET AL.

Order.

This cause having been heretofore on the — day of April, 1904, upon oral arguments by solicitors for complainant and defendant, made in open court, and upon written briefs submitted to the court upon motion to remand the cause to the state court, and upon the amended demurrer of defendant to complainant's amended bill of complaint, and by the court taken and held under advisement until this day, comes further on for hearing upon said motion and demurrer, and now on this 23d day of April, 1904, it is by the court considered and ordered that the motion of complainant to remand to the state court is denied, and the amended demurrer to the amended bill of complaint filed herein is sustained in accordance with a written memoranda of opinion this day filed in this cause and court.

JOHN C. POLLOCK, *Judge.*

Indorsed: No. 7719. Order. Filed April 23, 1904. Geo. F. Sharitt, Clerk.

In the Circuit Court of the United States for the District of Kansas, First Division.

No. 7719. Equity.

FREDERICK ZIMMERMAN, Administrator, Complainant,
vs.
KANSAS CITY NORTHWESTERN RAILROAD COMPANY ET AL., Defendant.

Order.

On this 25" day of April, A. D. 1904, upon the application of the complainant and for good cause shown, leave is hereby given said

complainant to file an amended bill within ten (10) days from this date.

JOHN C. POLLOCK, *Judge.*

Indorsed: No. 7719. Frederick Zimmerman Adm'r, etc. *vs.* Kansas City N. W. R. R. Co. Order. Filed April 25, 1904. Geo. F. Sharitt, Clerk.

63 In the Circuit Court of the United States for the District of Kansas.

FRED ZIMMERMAN, Adm'r,
vs.
KANSAS CITY N. R. R. Co.

Now comes the complainant herein, by Atwood and Hooper solicitors; and on motion it is ordered by the court, that the bill of complaint filed in this suit be and is now taken as confessed by defendant.

To the Clerk of said Court:

Enter the above in the order book in equity of said court.

ATWOOD AND HOOPER,
Solicitors for Complainant.

64 [Endorsed:] No. 7719. Zimmerman *vs.* K. C. N. R. R. Co. Order *pro Confesso.* Filed Oct. 3, 1904. Geo. F. Sharitt, Clerk.

65 In the Circuit Court of the United States for the District of Kansas, First Division.

Equity. No. 7719.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Complainant,
v.
THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, Defendant.

Motion to Vacate Decree.

The defendant above named moves the court for an order vacating and setting aside the decree *pro confesso* made and entered in the above entitled cause on the 3" day of October, 1904, for the reason that, as shown by the record in said cause and the opinion of the court heretofore rendered in sustaining the defendant's demurrer to the complainant's bill, the said court was without jurisdiction in said cause to render or enter said decree *pro confesso.*

WAGGENER, DOSTER & ORR,
Solicitors for Defendant.

Endorsed: No. 7719. United States Circuit Court. Frederick Zimmerman, Admr., *v.* Kansas City, Northwestern Railroad Company. Motion to vacate decree. Filed Oct. 26, 1904. Geo. F. Sharitt, clerk Waggener, Doster & Orr, for defendant.

65 UNITED STATES OF AMERICA, *District of Kansas, ss:*

At a term of the Circuit Court of the United States of America, for the District of Kansas, began and held at the City of Leavenworth, in said District on Monday the 6th day of June, A. D. 1904, proceedings were had and appear of record, in words and figures as follows, to-wit:

THURSDAY, *October* 27, 1904.

7719.

FREDERICK ZIMMERMAN, Adm'r., etc.,
vs.
KANSAS CITY NORTHWESTERN RAILROAD COMPANY ET AL.

The defendant's motion to vacate and set aside the decree *pro confesso* heretofore entered in this case on the 3d day of October, A. D. 1904, came on to be heard and was argued by counsel, the court having considered the same and being fully advised in the premises, it is by the court ordered that said order *pro confesso* be and the same is hereby set aside and held for naught.

67 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 7719.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Complainant,
v.
THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY ET AL., Defendant.

And now on this 25th day of June, 1906, the above entitled case coming on for hearing as set by the court, and complainant appearing by his attorney John H. Atwood, and the court having his attention directed to the fact that a mandate in said cause emanating from the United States Circuit Court of Appeals for the Eighth Circuit had been spread of record in the office of the Clerk of this court, which mandate requires a reversal of the judgment heretofore rendered herein, and an overruling of the demurrer heretofore sustained by this court, whose action in that regard was the occasion of the appeal from which said mandate emanates; and thereupon, the said complainant requested that the mandate be observed in the matter of overruling said demurrer; and thereupon it was by the court ordered and adjudged that said demurrer be overruled.

And thereupon the said complainant asked leave to withdraw the second amended bill of complaint from the files of this suit, which request is granted, and the same is hereby adjudged to have been withdrawn.

And thereupon the court directed that thirty days be given to the defendant to elect as to whether or not it will stand upon its demurrer and have final judgment rendered against it thereon, or whether it will elect to answer, and in the event that it elects to answer, sixty days is given said defendant in which so to do. To which order granting time to the defendant for election, is duly excepted to by complainant.

JOHN C. POLLOCK, *Judge.*

Endorsed: No. 7719. Order overruling demurrer, &c. Filed June 25, 1906. Geo. F. Sharitt, clerk.

68 In the Circuit Court of the United States for the District of Kansas, First Division. In Equity.

No. 7719.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Complainant.

vs.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, Defendant.

Motion.

Now comes the complainant herein and moves the court to render a decree in his favor herein as prayed for in his bill of complaint upon the allegations of said bill and the mandate of the Circuit Court of Appeals heretofore filed and entered of record herein.

ATWOOD & HOOPER,
Solicitors for Complainant.

Endorsed: No. 7719. Frederick Zimmerman, etc., *vs.* K. C. N. W. Ry. Co. Motion for decree. Filed Sept. 18, 1906. Geo. F. Sharitt, clerk.

69 In the Circuit Court of the United States for the District of Kansas, First Division.

FREDERICK ZIMMERMAN, Administrator of the Estate of Leonard Zimmerman, Deceased, Complainant,

vs.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, Defendant.

Order Pro Confesso.

1. On this 27th day of October, 1906 this cause came on to be heard at this term upon the bill of the complainant as last amended

and filed herein and it appearing that the amended bill in equity in the above entitled cause was filed in this court on May 9th, 1901 and that said defendant had duly entered its appearance and filed its demurrer thereto; that thereafter said demurrer came on for hearing and was, by this court, sustained, and was, by the complainant herein, duly appealed to the United States Circuit Court of Appeals for the Eighth Circuit; and that thereafter and on the 5th day of May, 1906 a mandate from the United States Court of Appeals was duly received and filed in this cause, which directed this court to reverse its decision on said demurrer and to overrule the same. That thereafter and on the 25th day of June, 1906 said matter came on for further hearing upon the mandate from said Court of Appeals and upon said day this court observed said mandate and overruled said demurrer of the defendant filed to the amended bill of complaint filed herein on the 9th day of May, 1901; and thereupon the said complainant asked leave to withdraw its second amended bill of complaint filed herein and leave to withdraw said bill of complaint was given at said time; and, upon the application of the defendant, thirty days' time was given said defendant to elect whether to stand by its demurrer and have final judgment rendered thereon or whether it would elect to answer; and in the event it elects to answer
70 sixty days from said last mentioned date was given said defendant in which to so do.

2. And it further appearing to the court that, at the expiration of said sixty days from said June 25th, 1906, said defendant had not entered any election, nor had it filed any answer to the amended bill of complaint filed as heretofore stated, nor has it any answer herein; and it further appearing to the court that on the 18th day of September, 1906 the said complainant filed its motion for a decree as prayed for in his said bill and this court having heretofore set said cause for hearing upon the day as aforesaid, came the complainant herein by Atwood and Hooper, his attorneys, and also came the defendant herein by Frank Doster its attorney, and thereupon came on for hearing the trial of this cause as asked for in said motion.

3. Thereupon the said defendant asked leave of court to refile its demurrer to said amended bill and the court, upon being advised in the premises, granted leave to said defendant to refile its demurrer, the same however, to be without prejudice to a hearing of this cause as asked for in said motion.

4. Thereupon said demurrer of said defendant was refiled and came on for hearing and the court, after being advised in the premises, overruled said demurrer. And thereupon came on for hearing this cause upon the motion of the complainant for a decree herein.

5. And it further appearing to the court that said defendant had failed to make any answer to the bills of complaint filed herein, but had filed its demurrer thereto, which demurrer had been overruled, the said bill stand as confessed and is now taken as true.

6. Now Therefore it is by the court considered, ordered and adjudged that the Clerk enter an order in the order book that the com-

plainant's bills filed herein be taken *pro confesso* as a matter of course.

JOHN C. POLLOCK, *Judge.*

Endorsed: No. 7719 Frederick Zimmerman etc. Plaintiff *vs.* K. C. N. W. R. R. Co. Defendant. Order *Pro Confesso*.. Filed Oct. 27, 1906 Geo. F. Sharitt, clerk

71 In the Circuit Court of the United States for the District of Kansas, First Division.

FREDERICK ZIMMERMAN, Administrator of the Estate of Leonard Zimmerman, Deceased, Complainant,

vs.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, Defendant.

Decree.

1. On this 27th day of November 1906 this cause came on to be heard and it appearing to the court that on the 27th day of October, 1906, it was ordered that a decree *pro confesso* be taken herein and it further appearing to the court that thirty days has elapsed since said order and it further appearing to the court that the defendant has not filed any pleading herein and is still in default.

2. Now therefore the bill and the amended bills of complaint filed herein stands as confessed and are taken as true and the court finds that said Frederick Zimmerman was, at the commencement of this suit and still is, the duly appointed, qualified and acting administrator of the estate of Leonard Zimmerman, deceased, and that said Kansas City Northwestern Railroad Company is a corporation, duly organized and existing under and by virtue of the laws of the State of Kansas and is the successor in interest of The Kansas City Wyandotte and Northwestern Railroad Company, also a corporation duly organized and existing under and by virtue of the laws of the State of Kansas.

3. The Court further finds that in the year 1899 and many years previous thereto and at all the times herein mentioned Leonard Zimmerman now deceased, was the owner of fractional Lot 7 in Block 7 and Lots 6 and 7 in Block 8, all in Fackler's Addition to the City of Leavenworth, Leavenworth county, Kansas. That Second
72 street was a duly laid-out and established graded street in said City of Leavenworth, running north and south and running between Block 7 lying on the east side, and Block 8, lying on the west side, of said Second street.

4. The court further finds that about May A. D. 1897 the said Kansas City Wyandotte and Northwestern Railroad Company constructed and built a railroad in a northeasterly direction through the City of Leavenworth until it came to a point on the south line of fractional Lot 7 of said Zimmerman's property and then, without any right or authority from him and without condemning the same, it

appropriated a part and portion of said fractional Lot 7 and constructed its road in the same direction between said blocks across and over said part and portion of said Second Street immediately in front of said Zimmerman's property and raised and made a high embankment of a permanent nature the whole width of said Second street and placed iron rails thereon and thereby changed and raised the established grade of said Second Street, as long prior thereto established by the City of Leavenworth, to a heighth of three feet immediately in front of the above described property and operated engines, cars and trains daily thereon and seriously and permanently impaired the egress and ingress to and from said property.

5. The court further finds that on the 2nd day of February, 1889 Leonard Zimmerman, deceased, began his action against said Kansas City Wyandotte and Northwestern Railroad Company in the District Court of Leavenworth county, Kansas to recover damages for the aforesaid wrongs and that on the 15th day of May, 1897, he recovered, in the above entitled court and cause, judgment against said Kansas City Wyandotte and Northwestern Railroad Company, for the sum of $3000.00 with interest thereon from said date at the rate of six per cent. per annum until paid and his costs therein expended, for damages sustained by reason of the appropriation of his land and the construction of the railroad as aforesaid, which judgment is now in full force and effect.

6. The court further finds that Leonard Zimmerman died on the 9th day of July, 1897, and thereafter and on the 7th day of May,
1898, said cause and judgment were duly revived in the name
73 of Frederick Zimmerman, Administrator of the estate of Leonard Zimmerman, deceased, and he was duly authorized to recover of and from said The Kansas City Wyandotte and Northwestern Railroad Company, said sum of $3000.00 with interest thereon at the rate of six per cent. per annum from the 15th day of May, 1897, and all costs therein expended.

7. And the court further finds that about January 2nd, 1888 said Kansas City Wyandotte and Northwestern Railroad Company executed and delivered to The Farmers Loan and Trust Company of New York a deed of trust or mortgage on its said railroad right-of-way, tracks, equipment, and franchise, which mortgage purported to cover the right-of-way appropriated as aforesaid.

8. The court further finds that on or about the 31st day of March, 1890, said Farmers Loan and Trust Company of New York commenced its suit in the Circuit court of the United States for the District of Kansas to foreclose said deed of trust or mortgage and on or about the 18th day of January, 1893 a decree was entered against said Kansas City Wyandotte and Northwestern Railroad Company foreclosing said deed of trust or mortgage and ordering that said property be sold.

9. The court further finds that on or about the — day of —— 1894, said property was sold to George C. Smith and B. P. Waggener, who were the agents and purchasing trustees for said defendant herein.

10. The court further finds that thereafter said George C. Smith

and B. P. Waggener, as such trustees, conveyed to the defendant herein, The Kansas City Northwestern Railroad Company, all of the property, rights and franchises purchased by and conveyed to them under said foreclosure proceedings and that such defendant took possession of all of said property, rights and franchises and also the premises in controversy, and has ever since the — day of ——, 1894, had possession thereof and daily operated its engines, trains and cars over and across said premises.

11. The court further finds that said B. P. Waggener one of the purchasing trustees at such foreclosure sale, was the general attorney for said Kansas Wyandotte and Northwestern Railroad Company and was one of the attorneys of record in said suit of Leonard Zimmerman against said last mentioned company and had actual knowledge of the pendency of said action in the District Court of Leavenworth county, Kansas and the nature and extent thereof and
74 what was claimed by said plaintiff in his said action and well knew that said plaintiff had not been compensated for his land appropriated and the damage sustained by him and that said defendant had actual knowledge of said complainant's claims mentioned herein.

12. The court further finds that after the recovery of said judgment by said Leonard Zimmerman and on the 21st day of May, 1899 said complainant commenced his action in the District court of Leavenworth county Kansas against said defendant to recover from it said sum of $3000.00 with interest thereon from the 15th day of May, 1897, and costs, the amount of the judgment recovered against The Kansas City Wyandotte and Northwestern Railroad Company as aforesaid; that said case was duly removed to this court and docketed on the equity side thereof and complainant recast his bill in conformity with the equity rules and thereafter, by leave of court, filed his amended bill herein on the 9th day of May, 1901 as heretofore stated.

13. Now Therefore it is by the court considered, ordered and adjudged that said complainant, Frederick Zimmerman, administrator of the estate of Leonard Zimmerman, deceased, have and recover of and from the said defendant, The Kansas City Northwestern Railroad Company $3000.00 with interest thereon from the 15th day of May, 1897, at the rate of six per cent. per annum until paid and the costs of said suit as prayed for in his said amended bill of complaint.

13½. The court further finds that one of the conditions in the said foreclosure decree was as follows:

"This court hereby reserves to itself from this decree the power and jurisdiction both as against the parties to this suit and as against said purchaser as said contemplated sale to hear and adjudicate all pending and undetermined claims hereafter presented, whether contracted by the receiver or the mortgagor company before the commencement of this suit, and to determine as to said claims whether they are or are not valid and entitled to priority over the mortgage debts hereinbefore referred to, and to make all such orders and supplem-ntary decrees touching said claims and demands as may be deemed proper."

And that a condition of the order of confirmation of said
75 foreclosure sale was as follows:

"And said master commissioner is ordered and directed to make to the purchasers at said sale, to-wit, George C. Smith and B. P. Waggener purchasing trustees, a good and sufficient deed, conveying the property mentioned and described in said report, to said purchasers, said report being confirmed, however, subject to the provisions of said original decree and subject to the provisions to be contained in the deed executed by said Master Commissioner to said purchaser."

And that the following order was endorsed on the purchasers' deed:

"The foregoing deed examined and approved subject to the condition that the purchaser take the property subject to all the orders of the court relating to the payment of the debts of the company, and the receiver, and said property shall remain liable for such debts if any there are remaining unpaid.

HENRY C. CALDWELL,
U. S. Circuit Judge."

14. It is further considered, ordered and adjudged that said complainant is entitled to and shall have and recover all his costs herein expended.

15. It is further considered, ordered and adjudged by this court, that if said defendant fails to pay said sum of money with the interest thereon as aforesaid within ninety days from this date then and in that case this court reserves the right to enforce the same by the processes of this court on execution or it may appoint a receiver or receivers to take possession of said defendant's railroad and equipment and operate the same and collect the revenues derived from such operation and apply them to the payment of said complainant's claim and costs, until said sum of $3000.00 with interest as aforesaid shall be paid and the costs herein ordered to be paid and to make all such other and further orders, at the foot of this decree as may be deemed meet and proper to enforce the rights of the complainant herein as against said defendant.

16. Upon the application of the defendant and for good cause shown an appeal is allowed herein.

JOHN C. POLLOCK, *Judge.*

76 Endorsed: No. 7719. Zimmerman *v.* K. C. N. W. R. R. Co. Decree. Filed Nov. 27, 1906. Geo. F. Sharitt, clerk.

77 In the Circuit Court of the United States for the District of Kansas, First Division.

No. —.

FREDERICK ZIMMERMAN, as Administrator of the Estate of L. Zimmerman, Deceased, Complainant,

vs.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, Defendant.

Assignment of Errors.

Comes now the defendant and files the following assignment of errors, upon which it will rely in the prosecution of its appeal in the above entitled cause.

1.

That the Circuit Court of the United States, for the District of Kansas, First Division, erred in overruling the demurrer interposed by the defendant to the bill of complaint filed in this cause and by holding and deciding under the matters and things stated in said bill it had jurisdiction of said cause, and jurisdiction to grant the relief prayed for in said bill.

2.

That the Circuit Court of the United States, for the District of Kansas, First Division, erred in rendering final decree against defendant on the bill filed herein and rendering judgment against defendant for costs.

3.

Wherefore, in order that the foregoing assignment of errors may be and appear of record the defendant presents the case to the court and prays that some disposition be made thereof in accordance with the law and statutes of the United States in such cases, and complainant prays a reversal of the decretal order and decree of final
78 judgment made and entered by said court.

B. P. WAGGENER,
Solicitor for Complainant.

Endorsed: No. 7719 Frederick Zimmerman *v.* The Kansas City Northwestern R. R. Co. Assignment of Errors. Filed Jan'y 17, 1907 Geo. F. Sharitt, clerk.

79 In the Circuit Court of the United States for the District of Kansas, First Division.

FREDERICK ZIMMERMAN, as Administrator of the Estate of L. Zimmerman, Deceased, Complainant,

vs.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, Defendant.

Petition for Allowance of Appeal.

The above named defendant considers itself aggrieved by the orders and decrees made and entered in the above entitled cause on the 27th day of November A. D. 1906, and on previous days, for the reasons specifically set out in the assignment of errors filed herein, and doth hereby appeal from said orders and decrees to the Supreme court of the United States, and prays that this appeal be allowed and that a transcript of the records appearance and proceedings, upon which said orders and decrees were made, duly authenticated, may be sent to the Supreme Court of the United States.

B. P. WAGGENER,
Solicitor for Complainant.

Endorsed: No. 7719 Frederick Zimmerman admr. &c. *vs.* The Kansas City Northwestern R. R. Co. Petition for allowance of appeal. Filed Jan'y 17, 1907 Geo. F. Sharitt, clerk.

80 In the Circuit Court of the United States for the District of Kansas, First Division.

No. —.

FREDERICK ZIMMERMAN, as Administrator of the Estate of L. Zimmerman, Deceased, Complainant.

vs.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, Defendant.

Order Allowing Appeal.

On, to-wit, the 17th day of January A. D. 1907, the Honorable John C. Pollock, Judge of the District Court of the United States, for the District of Kansas, First Division, at Chambers, in the Federal Building at the City of Topeka, Shawnee County, Kansas; on a motion of the solicitors and counsel for complainant, it is ordered that an appeal to the Supreme Court of the United States, from the final decree heretofore filed and entered herein, be and the same is hereby allowed. And that a certified transcript of the records, exhibits, and all proceedings herein be forthwith transmitted to said Supreme Court of the United States.

It is further ordered that bond on appeal and for supersedeas be

fixed at the sum of Five thousand dollars. Said bond also to cover costs and damages on appeal.

JOHN C. POLLOCK, *Judge.*

Endorsed: No. 7719. Frederick Zimmerman *vs.* The Kansas City Northwestern R. R. Co. Order allowing appeal. Filed Jan'y 17, 1907 Geo. F. Sharitt, clerk

81 In the Circuit Court of the United States, for the District of Kansas, First Division.

FREDERICK ZIMMERMAN, as Administrator of the Estate of L. Zimmerman, Deceased, Complainant.

vs.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, Defendant.

Bond.

Know all men by these presents, That we, The Kansas City Northwestern Railroad Company, defendant above named, as principal, and B. P. Waggener, as surety are held and firmly bound unto Frederick Zimmerman, as Administrator of the estate of L. Zimmerman, deceased, complainant above named, in the full sum of Five Thousand and no/100 dollars to be paid to said complainant, his attorneys, solicitors, executors, administrators and assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, firmly by these presents.

Sealed with our seals, and dated this 16 day of January, 1907.

Whereas, lately at a session of the Circuit Court of the United States for the District of Kansas, first Division, in a suit then pending in equity in said court between the aforenamed Frederick Zimmerman, as administrator of the estate of L. Zimmerman, deceased, complainant, and the Kansas City Northwestern Railroad Company, defendant, a final decree was rendered against said defendant, and said defendant having obtained from said court an allowance of appeal in said cause to reverse said decree, and a citation directed to said defendant is about to be issued citing and admonishing said defendant to be and appear at the next regular term of the Supreme court of the United States, to be held at the court room of said court at the City of Washington, District of Columbia;

82 Now therefore, the condition of this bond is such that if the said Kansas City Northwestern Railroad Company shall prosecute its appeal to effect and shall answer all damages and costs that may be awarded against it, if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and effect.

THE KANSAS CITY NORTHWESTERN RLY. CO.,
By B. P. WAGGENER, *Gen. Att'y.*
B. P. WAGGENER.

Sufficing of sureties on the foregoing bond approved this 17th day of January, 1907

JOHN C. POLLOCK, *Judge.*

Endorsed: No. 7719 Frederick Zimmerman admr. &c. *vs.* The Kansas City Northwestern R. R. Co. Bond on appeal. Filed Jan'y 17, 1907 Geo. F. Sharitt, clerk.

83 UNITED STATES OF AMERICA, *District of Kansas, ss:*

I, Geo. F. Sharitt, Clerk of the Circuit Court of the United States of America, for the District of Kansas, do hereby certify the foregoing to be a full, true and correct copy of the record and proceedings in said court in Case No. 7719 wherein Frederick Zimmerman, as Administrator of the estate of L. Zimmerman, deceased, is complainant and The Kansas City Northwestern Railroad Company is the defendant.

I further certify that the Original Citation is hereto attached and returned herewith.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Topeka, in said District of Kansas, this 24th day of January A. D. 1907.

[The Seal of the Circuit Court of the United States. 1862. District of Kansas.]

GEO. F. SHARITT, *Clerk.*

84 In the Supreme Court of the United States, October Term, 1906.

No. 609.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, Appellant,

vs.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Appellee.

Stipulation.

It is hereby stipulated by and between the parties hereto that the attached parts of the transcript of the record in the Circuit Court of the United States for the District of Kansas, First Division, being those parts of the record in the above entitled action in the lower court which are not attached to the record herein may be attached to and made part of the record in this court in pursuance of and in conformity with the motion of the Appellee filed herein and which was sustained by this court, and that certiorari need not issue herein.

Witness our hands this 25th day of May, A. D. 1907.

B. P. WAGGENER,
Solicitors for Appellant.
JOHN H. ATWOOD,
Solicitors for Appellee.

85 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 7719. Equity.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased,
v.
THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY.

Order.

And on this 6th day of January, 1905, comes on for hearing the motion of the defendant to dismiss the second amended bill of complaint filed on the 30th day of April, 1904. The court, having re-examined the case and fully considered the briefs and argument of counsel, sustains the motion of the defendant and dismisses the second amended bill of complaint herein filed upon the ground and for the reason stated in the memoranda of opinion herein filed on the 23d day of April, 1904.

JOHN C. POLLOCK, *Judge.*

Endorsed: 7719 Zimmerman *v.* K. C. N. W. Ry. Co. Order, dismissing second amended bill. Filed Jan'y 6, 1905 Geo. F. Sharitt, clerk.

86 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 7719. Equity.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Complainant,
vs.
THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, Defendant.

Petition for Appeal.

Now comes Frederick Zimmerman, Administrator of the estate of L. Zimmerman, deceased, complainant above named, and says that on or about the 6th day of January, 1905, this court entered judgment herein, in favor of The Kansas City Northwestern Railroad Company, the defendant and against the complainant herein, dismissing the complainant's second amended bill of complaint filed herein, in which order, judgment and proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of this complainant, all of which will more in detail appear from the assignment of errors, which is filed with this petition.

Wherefore, this complainant prays that an appeal may be allowed in this behalf to the United States Circuit Court of Appeals for the

Eighth Circuit, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

ATWOOD AND HOOPER,
Solicitors for Complainant.

87 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 7719. Equity.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Complainant,
vs.
THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, Defendant.

Assignment of Errors.

The complainant in this action in connection with his petition for an appeal makes the following assignment of errors, which he avers occurred upon the hearing of this cause, to-wit:—

First. That the court erred in not sustaining complainant's motion to remand said cause to the District Court of Leavenworth county, Kansas from whence it had come on removal at the instance of the defendant herein.

Second. That the court erred in sustaining the defendant's demurrer to the first amended bill of complaint filed herein.

Third. That the court erred in sustaining the motion of the defendant herein to dismiss the second amended bill of complaint filed herein on the 30th day of April, 1904.

Fourth. That the court erred in holding that the bill of complaint filed herein against the said defendant failed to state facts sufficient to constitute a cause of action against the said defendant, and that the complainant was not entitled to any relief therefrom.

Fifth. That the court erred in holding that the complainant could not obtain any relief, except by petition in intervention in the suit of The Farmer's Loan and Trust Company *vs.* The Kansas City Northwestern Railroad Company, heretofore pending in this court.

Sixth. That the court erred in holding that the said bill of complaint filed herein did not state any equities, which entitled
88 the complainant to the relief as prayed for in his amended bill of complaint filed herein.

Seventh. That the court erred in dismissing the second amended bill of complaint filed herein on the 30th day of April, 1904.

ATWOOD AND HOOPER,
Solicitors for Complainant.

Endorsed: No. 7719. Frederick Zimmerman, Plaintiff *vs.* The K. C. N. W. Railroad Co. Defendant. Petition and Assignment of Errors. Filed Jan'y 9, 1905. Geo. F. Sharitt, clerk.

89 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 7719. Equity.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Complainant,

vs.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, Defendant.

On this day came the complainant herein and files his petition for an appeal and his assignment of errors herein; and the court, upon due consideration, allows said appeal as prayed for by said complainant to the United States Circuit Court of Appeals for the Eighth Circuit, and the bond to be given by said complainant on said appeal is hereby fixed at three hundred ($300.00) dollars, the same to be conditioned as prescribed by law, the same to be approved by the Clerk of this court. Dated January 19th, 1905.

JOHN C. POLLOCK, *Judge.*

Endorsed: No. 7719 Frederick Zimmerman *vs.* The K. C. N. W. R. R. Co. Order Filed Jan'y 9, 1905 Geo. F. Sharitt, clerk.

90 In the Circuit Court of the United States for the District of Kansas, First Division.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Plaintiff,

vs.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, Defendant.

Bond.

Know all men by these presents that we, Frederick Zimmerman, administrator as aforesaid, as principal, and Lee Bond, as surety, are jointly and severally held and firmly bound unto the above named, The Kansas City Northwestern Railroad Company, in the sum of Three Hundred dollars, lawful money of the United States of America, to be paid to the said The Kansas City Northwestern Railroad Company, for which payment well and truly to be made, we bind ourselves, and each of us, our heirs executors administrators and assigns jointly and severally, firmly by these presents.

Sealed with our seals and dated this — day of January, in the year of our Lord, One Thousand Nine Hundred and Five.

The conditions of the above obligation are such that

Whereas, at a late term of the circuit Court of the United States for the District of Kansas, First Division, and on or about the 6th day of January, 1905 the defendant secured a judgment dismissing plaintiff's bill of complaint and an order of judgment was rendered

against said plaintiff dismissing his said bill and rendering judgment thereon for costs against him; and the said complainant having obtained from said court an order allowing an appeal to the United States Circuit Court of Appeals for the Eighth Circuit to reverse the order and judgment rendered in the aforesaid suit and a citation directed to said Kansas City Northwestern Railroad Company is about to issue citing and admonishing it to be at the
91 United States Circuit Court of Appeals for the Eighth Circuit to be hold*ing* at St. Louis in the State of Missouri.

Now the condition of the above obligation is such that if the said complainant shall prosecute his appeal to effect and shall answer all the damages and costs that may be awarded against him if he fail to make his plea — then the above obligation is to be void, otherwise to remain in full force and effect.

FREDERICK ZIMMERMAN, *Adm'r.*
LEE BOND.

Approved:
JOHN C. POLLOCK, *Judge.*

Endorsed: No. 7719 Frederick Zimmerman, admr. etc. Plaintiff *vs.* The Kansas City Northwestern R. R. Co. Defendant. Bond. Filed Jan'y 26, 1905 Geo. F. Sharitt, clerk

92 UNITED STATES OF AMERICA, *District of Kansas, ss:*

At a term of the Circuit Court of the United States of America for the District of Kansas, began and held at the City of Topeka, in said District on Monday the 27th day of November, 1905, proceedings were had and appear of record in words and figures as follows, to-wit:

MONDAY, *May* 21, 1906.

7719.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Complainant,
vs.
THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, Defendant.

Now comes the defendant herein by Atwood & Hooper, its attorneys and on their motion it is ordered by the court, that the mandate from the United States Circuit Court of Appeals filed May 5, 1906 be spread upon the records of this court.

Mandate.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Circuit Court of the United States for the District of Kansas, Greeting:

[SEAL.]

Whereas, lately in the Circuit Court of the United States for the District of Kansas, before you, or some of you in a cause between Frederick Zimmerman administrator of the estate of L. Zimmerman, deceased, complainant and The Kansas City Northwestern Railroad Company, defendant, wherein the decree of the said Circuit Court in said cause, entered on the 6th day of January A. D. 1905 is in the following words viz:

"And on this 6th day of January, 1905, comes on for hearing the motion of the defendant to dismiss the second amended bill of complaint filed on the 30th day of April, 1904. The court, having re-examined the case and fully considered the briefs and argument of counsel, sustains the motion of the defendant and dismisses the second amended bill of complaint herein filed upon the ground and for the reason stated in the memoranda of opinion herein filed
93 on the 23d day of April, 1904

JOHN C. POLLOCK, *Judge.*"

as by the inspection of the transcript of the record of the said Circuit Court, which was brought into the United States Circuit Court of Appeals for the Eighth Circuit by virtue of an appeal agreeably to the act of Congress, in such case made and provided fully and at large appears,

And whereas, in the present term of December, in the year of our Lord one thousand nine hundred and five, the said cause came on to be heard before the said United States Circuit Court of Appeals, on the transcript of record from said Circuit Court, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court, in this cause, be, and the same is hereby reversed with costs; and that Frederick Zimmerman, administrator of the estate of L. Zimmerman, deceased, have and recover against The Kansas City Northwestern Railroad Company the sum of Ninety Five and 15/100# Dollars for his costs in this behalf expended and have execution therefor.

It is further ordered that this cause be, and the same is hereby remanded to the said Circuit Court with directions to proceed in harmony with the views expressed in the opinion of this court.

MARCH 3, 1906.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this Court, as according to right and justice,

and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the Third day of May in the year of our Lord one thousand nine hundred and six.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

Costs of Appellant.

Clerk	$25.65
Printing Record	49.50
Attorney	20.00
	$95.15

94 UNITED STATES OF AMERICA, *District of Kansas, ss:*

I, Geo. F. Sharitt, Clerk of the Circuit Court of the United States of America, for the District of Kansas, do hereby certify the foregoing to be a true, full and correct copy of Order, dismissing Second Amended Bill, Petition for an Appeal, and Assignment of Errors, Order allowing Appeal, Bond on Appeal, and Order directing that Mandate of United States Circuit Court of Appeals be spread of record and Mandate in the suit of Frederick Zimmerman, administrator etc. *vs.* The Kansas City Northwestern Railroad Company, Case No. 7719 in said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Topeka, in said District of Kansas, this 21st day of May A. D. 1907.

[The Seal of the Circuit Court of the United States. 1862. District of Kansas.]

GEO. F. SHARITT, *Clerk.*

95 [Endorsed:] File No. 20574 Supreme Court U. S. October Term, 1907. Term No. 231. The Kansas City Northwestern R. R. Co., App't, *vs.* Fred'k Zimmerman, as adm'r, &c. Stipulation for addition to record. Filed June 5, 1907.

[Endorsed:] 231, 20574, June 5, '07.

Endorsed on cover: File No. 20,574. Kansas, C. C. U. S. Term No. 231. The Kansas City Northwestern Railroad Company, appellant, *vs.* Frederick Zimmerman, as administrator of L. Zimmerman, deceased. Filed February 16, 1907. File No. 20,574.

IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1907.

No. 231.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, Appellant,
vs.
FREDERICK ZIMMERMAN, as Administrator of the Estate of L. Zimmerman, Deceased, Appellee.

STIPULATION.

It is hereby stipulated by and between the parties hereto that Appellant may have printed and attached to the record on file in the Supreme Court of the United States any part of the record in the Circuit Court of the United States which may have been omitted from such record, and may have permission to file supplemental record and transcript.

B. P. WAGGENER,
Solicitors for Appellant.
JOHN H. ATWOOD AND
W. W. HOOPER,
Solicitor- for Appellee.

Oct. 26, 1907.

In the Circuit Court of the United States for the District of Kansas, First Division.

FREDERICK ZIMMERMAN, as Administrator of the Estate of L. Zimmerman, Deceased, Complainant,
vs.
THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, Defendant.

Certificate of Court as to Issue Involved.

This is to certify that the question involving the jurisdiction of the Circuit Court in the above entitled action was in issue herein, and was decided against the defendant, and in favor of the complainant; and the question whether this court acquired jurisdiction by the removal from the state court, and had jurisdiction to grant to the complainant the relief prayed for, is hereby certified to the Supreme Court of the United States for decision.

Witness my hand this 23rd day of October, 1907.

JOHN C. POLLOCK, *Judge.*

Endorsed: No. 7719. Zimmerman, adm'r, *vs.* K. C. N. W. R. R. Co. Certificate as to issue involved. Filed Oct. 25, 1907. Geo. F. Sharitt, clerk.

UNITED STATES OF AMERICA, *District of Kansas, ss:*

I, Geo. F. Sharitt, Clerk of the Circuit Court of the United States of America, for the District of Kansas, do hereby certify the foregoing to be a true, full and correct copy of Certificate as to issue involved in the suit of Frederick Zimmerman, as Administrator &c. *vs.* The Kansas City Northwestern Railroad Company, Case No. 7719 in said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Topeka, in said District of Kansas, this 25th day of October A. D. 1907.

[Seal of the Circuit Court of the United States, District of Kansas, 1862.]

GEO. F. SHARITT, *Clerk.*

[Endorsed:] File No. 20,574. Supreme Court U. S., October Term, 1907. Term No. 231. The Kansas City Northwestern R. R. Co., app't, *vs.* Frederick Zimmerman, adm'r, &c. Stipulation of counsel and addition to record. Filed Nov. 2d, 1907.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 231.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, APPELLANT,

vs.

FREDERICK ZIMMERMAN, ADMINISTRATOR OF THE ESTATE OF L. ZIMMERMAN, DECEASED.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

SUGGESTION OF DIMINUTION OF RECORD AND MOTION FOR CERTIORARI.

JOHN H. ATWOOD,
W. W. HOOPER,
Solicitors for Appellee.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 20204

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 609.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, APPELLANT,

vs.

FREDERICK ZIMMERMAN, ADMINISTRATOR OF THE ESTATE OF L. ZIMMERMAN, DECEASED, APPELLEE.

NOTICE.

To the above-named appellant and B. P. WAGGENER, its attorney of record:

You are hereby notified that the appellee, Frederick Zimmerman, administrator of the estate of L. Zimmerman, deceased, has filed his motion in the above-entitled court and cause suggesting a diminution of the record, a copy of which motion is hereto attached and made a part hereof.

You are hereby further notified that on Monday, April 1, 1907, said motion will be called up for hearing at the convening of said court or so soon thereafter as the same can be heard, at which time you may be present if you so choose.

ATWOOD & HOOPER,
Solicitors for Appellee.

Service of above notice acknowledged March 18, 1907.

W. P. WAGGENER,
B. P. WAGGENER,
Attorneys for Appellant.

IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1886.

No. 609.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY,
Appellant,
vs.
FREDERICK ZIMMERMAN, *Administrator of the Estate of L. Zimmerman, Deceased, Appellee.*

MOTION OF APPELLEE TO CORRECT RECORD.

Now comes Frederick Zimmerman, administrator of the estate of L. Zimmerman, deceased, and represents and shows unto this honorable court that this controversy has been heretofore taken on appeal to the United States Circuit Court of Appeals for the Eighth Circuit, and that there the question of jurisdiction as well as all questions upon the merits of said cause were submitted for determination by the parties to said court of appeals, and that said court of appeals in passing upon said cause passed upon the question of jurisdiction, as well as all questions upon the merits of said cause, and that said cause, after being duly submitted by the appellant and appellee to said court of appeals for determination, it was by said court of appeals duly determined adverse to the said appellant, and there was entered in said matter a judgment directing that the said Circuit Court of the United States for the District of Kansas, First Division, from which court this appeal has been taken, should enter the judgment herein appealed from, and a mandate was issued from said court of appeals to said circuit court to this effect, all of which fully appears from the records of said circuit court in this cause.

Therefore this appellee alleges that a complete transcript of the record of said circuit court has not been made or filed

herein by the appellant, and that a part of the same which is essential to a proper determination of this cause in this court has been omitted from the record herein, and the appellee, for said reasons, moves this court to require the appellant, or that it make an order, that a true transcript of the proceedings had and done in this cause in the said circuit court and in the said court of appeals be brought up from said circuit court and attached to the part of the record which has been brought here by the appellant, and that this court make all such further and necessary orders in the premises as shall be deemed meet and proper to present to this court a true transcript of the proceedings showing a true record of what was had and been done in said circuit court in said cause, as well as a true record of the proceedings of that which was had and been done in this cause in the Circuit Court of Appeals for the Eighth Circuit, as above mentioned.

And this your appellee will ever pray.

ATWOOD AND HOOPER,
Solicitors for Appellee.

IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1906.

No. 609.

THE KANSAS CITY NORTHWESTERN RAILWAY COMPANY,
Appellant,

vs.

FREDERICK ZIMMERMAN, *Administrator of the Estate of L. Zimmerman, Deceased, Appellee.*

AFFIDAVIT IN RE DIMINUTION OF RECORD.

STATE OF KANSAS,
Leavenworth County, ss:

W. W. Hooper, of lawful age, being first duly sworn, on oath, according to law, states that he is one of the solicitors for the appellee herein, and that he makes this affidavit for the reason that he is cognizant of the facts herein stated.

Affiant further states that said appellee commenced his suit in the District Court of Leavenworth County, Kansas, against the above-named appellant to recover the sum of $3,000.00 claimed to be due from said appellant to said appellee on account of damages sustained by him; that, on petition of the appellant, said suit was removed from said court to the Circuit Court of the United States for the District of Kansas, First Division, and that it being so removed and a transcript of the record being filed in said Circuit Court of the United States for the District of Kansas, First Division, appellee filed his demurrer to said bill, and as one of the grounds thereof alleged that the circuit court had no jurisdiction.

Affiant further states that said demurrer was by said court sustained; whereupon said appellee appealed said case to the

Circuit Court of Appeals of the United States for the Eighth Circuit, in which court all questions sought to be raised herein were submitted to said circuit court of appeals for determination; all of which will more fully appear from the opinion of said court in said cause, found in *144 Federal Reporter, at page 622*, being entitled Zimmerman *vs.* The Kansas City Northwestern R. R. Co., which opinion is referred to and made a part of this affidavit.

Affiant further states that thereafter and on the 3d day of May, 1896, a mandate from said circuit court of appeals was issued to the Circuit Court of the United States for the District of Kansas, First Division, and was received and filed in said court on the 5th day of May of said year; that thereafter, at a term of the Circuit Court of the United States for the District of Kansas, First Division, and on Monday, May 21, 1906, the mandate of said court was ordered spread upon the record in said cause; all of which will more fully appear from a certified copy of the record thereof hereto attached, made part hereof, and marked "Exhibit No. 1."

Affiant further states that after said mandate was entered of record, as aforesaid, said United States Circuit Court for the District of Kansas, First Division, rendered a judgment therein setting aside its former order sustaining the demurrer of the appellant, and thereupon said circuit court, upon the application of the appellant, granted leave to said appellant to plead or answer to the amended bill filed herein within sixty days from said date.

Affiant further states that said appellant failed to plead to the bill of complaint filed herein or to make any answer thereto, and after the expiration of sixty days stood in default; whereupon this affiant, for and on behalf of the appellee, filed his motion asking the court to enter an order taking its last amended bill filed herein *pro confesso;* which application was by the court granted.

Affiant further states that after the expiration of thirty days from the taking of said amended bill *pro confesso* the

appellee, through its solicitors aforesaid, made application for a final decree in said cause and notified said appellant that it would, on a certain day in its written notice named, ask said Circuit Court of the United States for the District of Kansas, First Division, for a final decree in said cause, and that on said day and in said cause the appellant appeared by Frank Doster, its solicitor, and the appellee by this affiant, its solicitor, and said appellant made application to said court to refile its demurrer heretofore filed in said cause, and which demurrer had been directed to be overruled by said Circuit Court of Appeals for the Eighth Circuit; that, over the objections of said appellee, the said Circuit Court of the United States for the District of Kansas, First Division, granted said application, however, to be without prejudice to a hearing at that time.

Affiant further states that after the refiling of said demurrer and on said day said demurrer came on again to be heard and was by said Circuit Court of the United States for the District of Kansas, First Division, overruled; and thereupon said appellant refused to further plead or answer, but was in default; and thereupon the court entered the decree appealed from herein by said appellant.

Affiant further states that the records of the Circuit Court of the United States for the District of Kansas, First Division, show the proceedings had and done as herein stated, and that the record filed herein by the appellant fails to show any other proceedings had as herein stated, and therefore said record in this cause should be amended so as to show such facts, so that this court can make a proper determination thereof and as prayed for in the motion filed by the appellee herein.

And further affiant saith not.

W. W. Hooper.

Subscribed and sworn to before me this 12th day of April, A. D. 1907.

[seal.] John H. Atwood, Jr.,
Notary Public.

My commission expires December 26, 1908.

UNITED STATES OF AMERICA,
District of Kansas, ss:

At a term of the Circuit Court of the United States of America for the District of Kansas began and held at the city of Topeka, in said district of Kansas, on Monday, the 27th day of November, A. D. 1905, proceedings were had and appear of record in words and figures as follows, to wit:

MONDAY, *May* 21, 1906.

7719.

FREDERICK ZIMMERMAN, *Administrator of the Estate of L. Zimmerman, Deceased, Complainant,*
vs.
THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, *Defendant.*

Now comes the defendant herein, by Atwood & Hooper, its attorneys, and on their motion it is ordered by the court that the mandate from the United States Circuit Court of Appeals, filed May 5 1906, be spread upon the records of this court.

MANDATE.

UNITED STATES OF AMERICA, *ss:*

[SEAL.]

The President of the United States of America to the Honorable the Judges of the Circuit Court of the United States for the District of Kansas, Greeting:

Whereas lately in the Circuit Court of the United States for the District of Kansas, before you or some of you, in a cause between Frederick Zimmerman, administrator of the estate of L. Zimmerman, deceased, complainant

and The Kansas City Northwestern Railroad Company, defendant, wherein the decree of the said circuit court in said cause, entered on the 6th day of January, A. D. 1905, is in the following words, viz:

"And on this 6th day of January, 1905, comes on for hearing the motion of the defendant to dismiss the second amended bill of complaint filed on the 30th day of April, 1904. The court, having re-examined the case and fully considered the briefs and argument of counsel, sustains the motion of the defendant and dismisses the second amended bill of complaint herein filed, upon the ground and for the reason stated in the memoranda of opinion herein filed on the 23d day of April, 1904.

"JOHN C. POLLOCK, *Judge.*"

as by the inspection of the transcript of the record of the said circuit court, which was brought into the United States Circuit Court of Appeals for the Eighth Circuit by virtue of an appeal, agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas in the present term of December, in the year of our Lord one thousand nine hundred and five, the said cause came on to be heard before the said United States Circuit Court of Appeals on the transcript of record from said circuit court and was argued by counsel:

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, reversed with costs; and that Frederick Zimmerman, administrator of the estate of L. Zimmerman, deceased, have and recover against the Kansas City Northwestern Railroad Company the sum of ninety-five and 15/100 dollars for his costs in this behalf expended, and have execution therefor.

It is further ordered that this cause be, and the same is hereby, remanded to the said circuit court with directions to proceed in harmony with the views expressed in the opinion of this court.

MARCH 3, 1906.

You therefore are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this court, as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the third day of May, in the year of our Lord one thousand nine hundred and six.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

Costs of Appellant.

Clerk	$25.65
Printing record	49.50
Attorney	20.00
	$95.15

(Endorsed:) #7719. United States Circuit Court of Appeals, December term, 1905. No. 2228. Frederick Zimmerman, adm'r, &c., appellant, *vs.* Kansas City Northwestern Railroad Company. Mandate. Filed May 5, 1906. Geo. F. Sharitt, clerk.

UNITED STATES OF AMERICA,
District of Kansas, ss:

I, Geo. F. Sharitt, clerk of the Circuit Court of the United States of America for the District of Kansas, do hereby certify the foregoing to be a true, full, and correct copy of an order of said court from the record of the proceedings thereof in the suit of Frederick Zimmerman, administrator of the estate of L. Zimmerman, deceased, *vs.* The Kansas

City Northwestern Railroad Company, case No. 7719 in said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office, in Topeka, in said district of Kansas, this 30th day of March, A. D. 1907.

[SEAL.] G. F. SHARITT, *Clerk.*

(20,574.)

Supreme Court of the United States.

OCTOBER TERM, 1907

The Kansas City Northwestern Railroad Company, Appellant. VS. Frederick Zimmerman, as Administrator of the estate of L. Zimmerman, deceased; E. A. Kelly, Administrator *de bonus non* of the estate of L. Zimmerman, substituted for Frederick Zimmerman, Administrator Appellee.	No. 231

BRIEF OF APPELLEE.

MOTION TO DISMISS.

(TITLE OMITTED.)

Now comes E. A. Kelly, administrator *de bonus non* of the estate of L. Zimmerman, deceased, and moves the court to dismiss this appeal for the reason that all the matters and things sought to be reviewed in this court have been reviewed by the United States Circuit Court

of Appeals for the Eighth Circuit and decided adverse to said appellant company (146 Federal Reporter, page 622) and said judgment has become final, said appellant company never having taken any steps to have the judgment of the United States Circuit Court of Appeals for the Eighth Circuit reviewed in this court and the time in which such review can be had has lapsed.

JOHN H. ATWOOD,
Solicitor for Appellee.

WILLIAM W. HOOPER,
of Counsel.

STATEMENT OF FACTS.

On the 15th day of May, 1897, L. Zimmerman recovered a judgment against The Kansas City, Wyandotte and Northwestern Railroad Company for the sum of $3000.00, with interest thereon from May 15th, 1897, until paid, at the rate of six per cent. per annum and costs of suit, on account of damages sustained by him by reason of said company appropriating a right-of-way over his land and making an embankment some three feet high above the established street grade in front of his premises, thereby destroying ingress and egress thereto and therefrom. (Record 53, Paragraph 4.)

L. Zimmerman afterwards died and Frederick Zimmerman, his son, was duly appointed administrator of his estate.

The Kansas City, Wyandotte and Northwestern Railroad Company, some time in the year 1888 and at about the time the right-of-way was appropriated, as aforesaid, gave a mortgage to The Farmers Loan and Trust Company of New York on all its property, rights and franchises, and in 1894 this mortgage was foreclosed in the Circuit Court of the United States for the District of Kansas, First Division and all the property described in said mortgage was sold under the directions of said court and was bought by a purchasing committee, who afterwards conveyed to the appellant herein; said appellant, through its officers and agents, at all times having due notice of the action of said L. Zimmerman to recover damages, as above stated, as this action was brought in March, 1889.

After L. Zimmerman recovered his judgment, as aforesaid, and said Frederick Zimmerman was appointed administrator, as above stated, he, as administrator, brought suit in the District Court of Leavenworth County, Kansas, against the appellant herein asking that it be required to pay said judgment or that it be enjoined from using said land, appropriated as aforesaid.

In the petition said Zimmerman made the following allegation:

> "Plaintiff further avers that during this time and about January 2nd, 1888, The Kansas City, Wyandotte and Northwestern Railroad Company mortgaged

said road, franchises and equipment to The Farmers Loan and Trust Company of New York and that on or about March 21st, 1890, said Trust Company began its action in the Circuit Court of the United States for the District of Kansas, First Division, to foreclose its said mortgage and that on or about the 18th dav of June, 1891, a decree was entered against said Kansas City, Wyandotte and Northwestern Railroad Company foreclosing said mortgage and ordering said property to be sold unless within some short time thereafter in said decree mentioned said Railroad Company, or some person or persons for it, should pay the amount of said mortgage indebtedness with the expenses and costs thereof and that on or about the ——day of———, 189— said Railroad Company and all its equipment, appurtenances, etc. were ordered to be sold and were, on or about the——day of———, 1890, duly sold to the appellant, The Kansas City Northwestern Railroad Company, and that said defendant became the successor in interest of all rights and privileges of The Kansas City, Wyandotte and Northwestern Railroad Company, and as part of the consideration assumed and was subject to all the liabilities * * of the Kansas City, Wyandotte and Northwestern Railroad Company, under and by

virtue of said decree and purchase." (R. 4) (R. 2 to 6)

In due course of time the appellant, The Kansas City Northwestern Railroad Company, filed its petition and bond in said District Court, asking that said cause be removed to the Circuit Court of the United States for the District of Kansas, First Division, alleging in its petition for removal that a Federal question was involved, to-wit: the construction of a Federal decree; and in due time a transcript of the record was filed in the Circuit Court of the United States for the District of Kansas, First Division. (R. 12 to 15)

After the case was removed to the Federal Court and a transcript of the record filed, said administrator obtained leave of court to recast his pleading to conform to the equity practice of said court, which was done. (R. 17 to 23)

Afterwards he filed an amended bill of complaint and the appellant company filed its demurrer and amended demurrer thereto, the grounds, or one of the grounds of said demurrer being that the Circuit Court of the United States for the District of Kansas, First Division had no jurisdiction of this cause and that if the plaintiff was entitled to any relief he should file his petition in intervention in the Farmers Loan and Trust Company foreclosure suit for the reason that in said suit the court had reserved jurisdiction over such

claims as the plaintiff asserted in this cause. (R. 44 to 46)

Said Zimmerman, as administrator, also filed his motion to remand said cause to the District Court of Leavenworth County, Kansas. (R. 46)

Thereafter said demurrers and motion came on for hearing and the motion to remand was overruled, and the demurrers so filed by said appellant company were sustained and the case dismissed. (See opinion and order R. 47–48)

Afterwards said Zimmerman filed his petition and assignments of error, asking for an appeal, which appeal was allowed and taken to the United States Circuit Court of Appeals for the Eighth Circuit. (R. 61 to 62)

A transcript of the record was duly filed in said United States Circuit Court of Appeals for the Eighth Circuit and said cause came on for hearing and the judgment sustaining said demurrers to said bills of complaint, filed as aforesaid, and dismissing said cause of action, was reversed; said Court of Appeals passed upon all questions involved and presented by said bill, not only the question of jurisdiction but also as to the merits presented by the facts, as alleged in said bill. (See Zimmerman, Administrator v. Kansas City Northwestern Railroad Co., 144 Federal Reporter, page 622; see also the mandate of the United States Circuit Court of Appeals for the Eighth Circuit reversing the Circuit Court of the United

States for the District of Kansas, First Division, R. 65.)

Under the rules and practice of said court, after the expiration of 60 days said appellant company, having taken no further action in the cause, having filed no application for *certiorari* or appeal to this court, a mandate was issued by said Court of Appeals, directing the lower court to reverse its decision and to proceed in accordance with the views of said Court of Appeals. (R. 65)

Afterwards proper proceedings were had which resulted in a decree in favor of said Zimmerman, as administrator, which adjudged and decreed that said appellant company should pay said Zimmerman's claim. (See R. 53 to 56)

The company appealed direct to this court from this decree on the ground that the Circuit Court had no jurisdicti *n*, seeking, in this way, to have this decree reversed.

Afterwards said Frederick Zimmerman, administrator as aforesaid, died and such proceedings were had as to duly revive said action and to substitute E. A. Kelly as administrator *de bonus non* in the place and stead of said Frederick Zimmerman, deceased.

I

ARGUMENT.

At the threshold of this case we submit that under the decision of this court the decree of the Circuit Court of the United States for the District of Kansas, First Division, should be affirmed

or this appeal dismissed, for the reason that the demurrers filed by appellant company to the amended bill rested, in part, upon the ground that said Circuit Court had no jurisdiction to hear this cause and if Zimmerman, the complainant therein, was entitled to any relief, it was his duty to file his petition in intervention in the suit of the Farmers Loan and Trust Company, in foreclosure, above mentioned; that said Circuit Court retained jurisdiction to determine Zimmerman's claim, if any he had; said Circuit Court sustained the Railroad Company's contention and rendered judgment accordingly; and Zimmerman, not being satisfied with the decision of said Circuit Court filed his appeal in said Court of Appeals; and the question of jurisdiction raised by the appellant as well as the merits of this cause,were submitted to said Circuit Court of Appeals; and all questions presented by the record, and especially the question of jurisdiction, was passed upon by said Court of Appeals. (Zimmerman, Administrator v. The Kansas City Northwestern Railroad Company, 144 Federal Reporter, page 622.) The decision is as follows:

UNITED STATES CIRCUIT COURT OF APPEALS

EIGHTH CIRCUIT.

NO. 2228—DECEMBER TERM, A. D. 1905.

Frederick Zimmerman, Administrator of the Estate of L. Zimmerman, Deceased, Appellant, vs. The Kansas City, Northwestern Railroad Company, Appellee. } Appeal from the Circuit Court of the United States for the District of Kansas.

Mr. John H. Atwood (Mr. William W. Hooper was with him on the brief) for appellant.

Mr. Frank Doster (Mr. B. P. Waggener, Mr. James W. Orr and Mr. W. P. Waggener were with him on the brief) for appellee.

Before SANBORN and ADAMS, Circuit Judges.

This was a bill in equity to enjoin the defendant company from operating its railroad over a lot of ground formerly owned by plaintiff's intestate, Zimmerman, until a judgment rendered against its predecessor in title, for damages sustained by the taking and appropriation of the lot should be paid.

By the Statutes of Kansas in force at the times hereinafter mentioned, (Sec. 1359 *et seq.*, Gen. Stats. 1901,) a scheme was provided by which railroad corporations in the exercise of the right of eminent domain might apply to a board of

commissioners to locate their roads make assessments of the value of the land taken and the damages occasioned thereby to the several owners, with provision for an appeal, so far as assessment of damages was concerned, to the District Court.

Without attempting to comply with the provisions of this statute, the Kansas City, Wyandotte & Northwestern Railway Company, hereinafter called Wyandotte Company, in 1887 entered as a trespasser upon and appropriated to its own use as a part of its right of way, a lot of ground in the City of Leavenworth belonging to plaintiff's intestate, and by disturbance of the established grade of the street, impaired ingress and egress to and from the lot.

In 1889 Zimmerman commenced an action against the Wyandotte Company in the District Court of Leavenworth County to recover damages sustained by the appropriation of his land and the construction of the railroad thereon. This resulted, in 1897, in a judgment in his favor for $3,000.00.

In 1888 the Wyandotte Company executed its mortgage conveying its railroad to a trustee to secure the payment of an issue of bonds Afterwards the trustee commenced an action in the Circuit Court

of the United States for the District of Kansas, and in 1896 secured a decree foreclosing the mortgage and ordering the property sold. It was subsequently sold to a purchasing committee who conveyed it to the defendant company. The decree, which by reference was made part of the bill, contained the following provision: "This court hereby reserves to itself from this decree, the power and jurisdiction both as against the parties to this suit and as against said purchaser at said contemplated sale, to hear and adjudicate all pending and undetermined claims hereafter presented, whether contracted by the receiver or the mortgagor company, before the commencement of this suit and to determine as to said claims whether they are or are not valid and entitled to priority over the mortgage debts hereinbefore referred to, and to make all such orders and supplementary decrees touching said claims and demands as may be deemed proper," etc. The substance of this provision was also found in the purchasers' deed.

Defendant company, after the purchase, took possession of the lot as part of its right of way and has since then constantly retained and used the same. Neither the mortgagor company nor the purchasing company have ever paid

plaintiff's judgment or otherwise compensated Zimmerman for the damages sustained by him by reason of the taking and appropriation of his lot.

The trial court sustained a demurrer to this bill and after a final decree of dismissal it was brought here by appeal.

Adams, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Notwithstanding all the parties are citizens of Kansas, it is practically and we think necessarily conceded that the court below acquired jurisdiction, on the ground that the suit as originally brought involved a construction of the decree of the Federal Court in the foreclosure suit. We accordingly refrain from further considering the jurisdictional question raised by the assignment of error.

As the Wyandotte Company appropriated Zimmerman's lot without resorting to the statutory method of exercising the right of eminent domain or otherwise legally acquiring title or right to do so, it conferred upon Zimmerman the right to waive the trespass and commence his action in the District Court, the same as he might have done had formal proceed-

ings been taken by the railroad company and he had been dissatisfied with the award of the commissioners, "to recover compensation for all the damages which he sustained by reason of the permanent taking and appropriation of the right of of way by the railroad company." *C. B. U. P. R. R. Co.* v. *Andrews*, 26 Kan. 702, 710; *Cohen* v. *St. L., Ft. S. & W. R. R. Co.*, 34 Kan. 158; *Wichita & W. R. R. Co.* v. *Fechheimer;* 36 Kan. 45; *U. S.* v. *Great Falls Mfg. Co.*, 112 U. S. 645.

The bill discloses the true nature of Zimmerman's action as originally instituted in 1889. It was not an action of trespass *quare clausum fregit* to recover damages then accrued, but waiving the trespass committed by the railroad company and recognizing its action as the legal equivalent of formal proceedings of condemnation, Zimmerman sought by his suit exactly what he would have secured had such formal proceedings been taken and had he appealed from the award of the commissioners to the District Court to correct the same. His action was to secure such an award and the judgment, is in legal effect an award of all damages, past, present and future, which he sustained by reason of the appropriation of his lot.

The payment of this award was a con-

dition to the acquisition of title by the Wyandotte Company. Article 12, Sec. 4 of the constitution of Kansas ordains that "No right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money or secured by a deposit of money to the owner * * *."

It is settled law that under constitutions of this character, which generally prevail in the United States, title does not pass from the owner of land appropriated to public use to the corporation making such appropriation until compensation has been actually made. *Kennedy* v. *Indianapolis*, 103 U. S. 599, 604; *Cherokee Nation* v. *S. Kansas Railway Co.*, 135 U. S. 641, 659; *Drury* v. *Midland Railroad*, 127 Mass. 571, 576; *Western Pa. R. R. Co.* v. *Johnston*, 59 Penn. St. 290; *Provolt* v. *Chicago, Rock Island & Pac. R. R. Co.* 57 Mo. 256.

The owner, by laches or waiver, may lose his right to enjoin the trespass or his right to an action of ejectment to regain possession. *Wichita & W. R. R. Co.* v. *Fechheimer* (*supra*); *Buckwalter* v. *A. T. & S. F. Ry. Co.*, 64 Kan. 403, but title or unconditional right to enjoy the free use of the property taken does not

accrue until the damages incident to its appropriation are paid.

It appears from the bill that Zimmerman's suit was brought before the foreclosure suit was instituted and before defendant purchased the railroad; that the same was, with the full knowledge of defendant company, pending at the time of the judgment of foreclosure and purchase by the defendant. The judgment subsequently rendered in that suit would, of course, be conclusive as to Zimmerman's damages so far as the Wyandotte Company itself was concerned. This is not disputed. It is, in our opinion, equally conclusive against the purchasing company.

In the case of *Pfeifer* v. *Sheboygan & Fond du Lac R. R. Co.* 18 Wis. 155, it appears that the plaintiff was owner of lands taken by a railroad company for public use; that legal proceedings were had to assess the damages which resulted in a judgment in the owner's favor, which was not paid. The road was subsequently sold in foreclosure proceedings, purchased by a committee and resold to defendant railway company. It took possession thereof, including the right of way over plaintiff's lot. The action was brought to compel the new road to pay

the amount of the judgment against its predecessor. The court held that the new company, by taking possession of plaintiff's lot and operating its road over it, subjected itself to the condition, on which its predecessor held it, of paying the judgment against it for damages.

To the same effect are the following cases: *Gilman* v. *Sheboygan & Fond du Lac R. R. Co.*, 40 Wis. 653; *Drury* v. *Midland R. R. Co.* (*supra*); *Bridgman, Administrator,* v. *St. Johnsbury & L. C. R. R. Co.* 58 Vt. 198; *Western Penn. R. R. Co.* v. *Johnston,* (*supra*); *Rio Grande & E. P. Ry. Co.* v. *Ortiz,* 75 Tex. 602; *Organ* v. *Memphis & L. R. R. Co.* 51 Ark. 235; *Lake Erie & Western Ry. Co.* v. *Griffin,* 107 Ind. 464; *Chicago & S. E. R. Co.* v. *Galey,* 141 Ind. 360

The principles announced in the foregoing authorities, without quoting at length from them, may be summarized as follows: under constitutions and laws similar to those of Kansas the land owner's right to damages sustained by an appropriation of his land by railroad corporations is paramount to the rights of a subsequent mortgagee; a purchaser from the company originally appropriating the land holds title to it, subject to the condition of paying the damages

occasioned by the appropriation and a judgment for such damages secured against the original company is conclusive against the purchasing company.

From the foregoing we think it follows conclusively that defendant should not be permitted to continue the use of plaintiff's lot without paying the damages awarded to him, unless the decree in the foreclosure suit determines otherwise.

Many of the cases cited (*supra*) deal with the liability of railroad companies purchasing property under decrees of foreclosure of mortgages, like that involved in this case. There is no suggestion in any of them that such fact presents an obstacle to the assertion of liability against the purchasing company; neither do we perceive how such fact could in itself vary the general rule announced in those cases. But it is earnestly contended by counsel for defendant, that complainant has no rights except such as were conferred by the decree of foreclosure and that his only remedy to secure compensation for the lot taken was by intervention in the foreclosure suit.

The provision of the decree on which reliance is placed is fully set out in the

statement preceding this opinion. It reserved jurisdiction "as against the parties to this suit and as against said purchaser at said contemplated sale, to determine whether claims contracted by the mortgagor or the receiver were valid and entitled to priority over the mortgage debt." This reservation is limited in its character. It does not purport to reserve jurisdiction over all persons, but only over the parties to the suit, including the purchaser of the property and then only for the purpose of determining the validity and priority over the mortgage debt of claims contracted by the mortgagor or receiver.

Plaintiff's intestate was not a party to the foreclosure suit, and it was of no consequence to him whether his claim was prior in right or equity to the mortgage debt or not. He was not asserting any preferential claim but was standing on the right guaranteed to him by the constitution of his state, that his property should not be taken for public use without payment of just compensation. The Wyandotte Company never made this payment and accordingly, acquired no title to the lot. It could therefore convey no title by mortgage or otherwise so as to free the purchaser, provided he desired to continue the use of the lot,

from performance of the fundamental condition on which its use depended. This, Zimmerman knew, because it was the law of the land. He had no occasion to ask the court in charge of the foreclosure proceedings to protect his rights or decree him a lien superior to the mortgage debt. He had no lien strictly speaking, but did have a remedy superior to the enforcement of any lien and co-existent with the use that any subsequent purchaser might make of his lot, and that was to require such purchaser to perform the condition upon which such use depended.

As said by the late Judge Simonton in *Wheeling Bridge & Terminal Ry. Co.*, v. *Reymann Brewing Co.*, 90 Fed. 189, 193: "It is not a question of a preferential claim, in the sense of a claim having superior equities to the mortgage debt. It is the payment of the claim which outranks the mortgage, independent of it, unaffected by the proceedings for foreclosure."

We have no occasion in this case to consider and therefore refrain from expressing any opinion of the possible effect of want of knowledge by the purchaser of the lot owner's claims, prior to the purchase. The bill under consideration

shows that the defendant purchased the railroad with actual knowledge of Zimmerman's claims.

We do not question the soundness of the doctrine urged upon us by defendant's counsel, based on the cases of *Jesup* v. *Wabash, St. L. & P. Ry. Co.* 44 Fed. 663; *Thompson* v. *N. Pac. Ry. Co.* 93 Fed. 384, to the effect that claims against the receiver must be presented to the court appointing him, in cases where the payment of such claims is, by the decree imposed upon the purchaser as a part of the purchase price. But in our opinion, the case before us depends for its solution upon principles not involved in them. Neither do we doubt that Zimmerman might have waived his constitutional right to insist upon the pre-payment of his damages and have elected to hold the trespassing company in a personal action only for damages, thereby foregoing his constitutional protection and extending personal credit to the company. But such is not this case. Zimmerman waived the trespass but treated the railroad company as exercising, though informally, its right of eminent domain, and as a recognized substitute for the procedure provided by statute, brought his suit for the damages sustained by the taking and appropriation of his lot.

By authority of the Kansas cases above cited the judgment secured in such a suit was the equivalent of the award of damages contemplated by the statute. (Secs. 1359 *et seq.*) and under the constitution and laws of Kansas, entitled the owner to full payment thereof as a condition recedent to disvestiture of his title.

We are unable to see how the statute of limitations can afford protection to the defendant. Zimmerman excused the unlawful entry, waived the trespass and treated the entry as the exercise of the right of eminent domain. He seasonably brought his suit for an award of damages, and in 1897, secured judgment therefor. In 1899 this suit was instituted. No statute of which we are aware barred Zimmerman's right of action at that time.

We have purposely refrained from referring to the proceedings in the court below relative to the filing and striking out of the amended bill and granting leave to file an intervening petition in the foreclosure case. All questions determinative of the rights of parties are, in our opinion, presented by the demurrer to the first bill filed in the court below, and as we find nothing in the course of procedure afterwards, affecting the rights

so presented, we do not deem it necessary to further consider them. The trial court, in our opinion, committed error in sustaining the demurrer to the bill. The decree must therefore be reversed and the cause remanded with instructions to proceed in harmony with this opinion.

Filed March 3, 1906.

A true copy.

Attest:

Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

In *Robinson* v. *Caldwell*, 165 U. S., 359; s. c. 41 L. C. P. 745 this court passed upon the question here involved. The syllabus is as follows:

> "An appeal to this court from the Circuit Court on the ground that the jurisdiction of the Circuit Court is in question cannot be maintained when the appellant has also taken an appeal to the Circuit Court of Appeals and the whole case on its merits has been determined by it, although the construction of a treaty and the constitutionality of an act of Congress were drawn in question in the Circuit Court; such case can be taken to this court only upon *certiorari* after final decree upon the merits in the Circuit Court of Appeals."

In the opinion the court said:

> "We are of the opinion that the present

> appeal must be dismissed. After the final decree upon *the merits in the Circuit Court of Appeals*, this court, under the circumstances stated, could properly take cognizance of the case, in respect of any question involved in it, only upon *certiorari*."

In this case Robinson, of course, took the appeal in both instances, but this can make no difference, for if one party is bound by a decree of a court the other must also be bound and if the company was not satisfied with the decision of the Court of Appeals it should have obtained a review of this case on *certiorari*, as suggested in the last paragraph of the court's opinion.

In *Carter* v. *Roberts*, 177 U. S. 496; s. c. 44 L. C. P., 861 this court again announced the law to be as follows:

> "A direct appeal to the Supreme Court of the United States from a decision of a Circuit Court involving a constitutional right cannot be taken, under the act of Congress of March 3, 1891, after the cause has been appealed to and decided by the Circuit Court of Appeals, as that act does not permit *independent appeals to both courts*."

In the opinion the court says:

> "But when the Circuit Court of Appeals has acted on the whole case its judgment

> stands unless revised by *certiorari* to or appeal from that court in accordance with the act of March 3, 1891."

In *Ayers* v. *Polsdorfer,* 187 U. S. 585; 47 Law Ed. 314, this court in the opinion says:

> "Therefore, when the jurisdiction of the Circuit Court is invoked solely on the ground of diversity of citizenship, two classes of cases can arise, one in which the questions expressed in Sec. 5 appear in the course of the proceedings and one in which other Federal questions appear. *Cases of the first class may be brought to this court directly, or may be taken to the Circuit Court of Appeals. But if taken to the latter court they cannot then be brought here.* Cases of the second class must be taken to the Circuit Court of Appeals, and its jurisdiction will be final. The case at bar falls under one or under the other of those classes."

This principle is again affirmed in *Cincinnati, Hamilton & Dayton R. R. Co.* v. *Thiebaud,* 177 U. S. 615; s. c. 44 L. C. P. 911.

Also in the case of *Cary Mfg. Co.* v. *Acme Flexible Clasp Co.,* 187 U. S. 427; s. c. 47 Law Ed. 244.

In the last mentioned case this court, in the opinion, says:

> "But it is settled that even if a party

> might be entitled to come directly to this court under that section, yet if he does not do so, and carries his case to the Circuit Court of Appeals, he must abide by the judgment of that court."

If it should be urged that in these cases the appeal, both to the Court of Appeals and to the Supreme Court, was taken by the same party, the answer is this: The Circuit Court of Appeals was created for the purpose of relieving this court of certain of its burdens and when the parties litigant have had the benefit of the wisdom of the Circuit Court of Appeals *or* of the Supreme Court, in one of that class of cases that might go to either, then the purposes of the law have been fulfilled. If one of those cases that might go to either court, but cannot go to both, could be taken to the Court of Appeals and *then* taken to the Supreme Court, a large part of the burden, of which, the act was intended to relieve this court, would continue to rest upon it. It can make no possible difference at whose instance or by whose invocation the judgment and wisdom of the Appeals Court was obtained. The Circuit Court of Appeals passed upon the merits of the case and the question of jurisdiction without reference to which of the parties litigant brought the case before it. The plaintiff invoked the wisdom of that court; the defendant derived benefit from it as much as the complainant, and is bound by it as much as the complainant.

The appellant herein was properly before the

Court of Appeals; it presented its brief on the question of jurisdiction, as well as on the merits of the cause; it has permitted the judgment of the Court of Appeals to become final, and the mandate to be sent from that court directing the lower court to proceed in accordance with its views as expressed in its opinion; in accordance with the opinion and mandate of the Court of Appeals, the lower court acted; under the law it was bound to follow the instructions of the Court of Appeals, since the defendant had taken no action of any kind to have the decision of the Court of Appeals reviewed by this court *on certiorari*. To hold that the defendant could remain silent and wait until the lower court acted, render a decree in accordance with the decision of the Court of Appeals and then appeal to this court, when it knew, under the law, the lower court was bound to follow the views of the Court of Appeals as the law of the case, would be making the action of the Court of Appeals in rendering its opinion a vain and foolish performance. To permit either party to present exactly the same question to this court that was presented to the Court of Appeals is holding that all that thatcourt did amounted to nothing.

To so hold is to hold that the appellant company could obtain an appeal from the decision of the Court of Appeals without regard to the decision of the Court of Appeals and without in any manner trying to obtain relief from that decision by *certiorari* or appeal as provided by law; but on

the contrary acquiescing in its decision and well knowing that the lower court must follow its directions, waits until it does, not changing its position in any manner, shape or form, it then seeks to have reviewed in this court the whole proceeding without regard to anything that has been said by the Court of Appeals upon the same propositions.

We therefore submit that this case falls within the principle announced in the above decisions and should be dismissed.

JOHN H. ATWOOD,
Solicitor for Appellee.

W. W. HOOPER,
of Counsel.